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In The

Supreme Court of The United States

October Term 1995

CITY OF PHILADELPHIA,
Petitioner

vs.

RAMONA AFRICA, *et al.*,
Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

Petition For Writ Of Certiorari

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QUESTION PRESENTED

1. Did the United States Court of Appeals for the Third Circuit directly contradict this Court's holdings regarding municipal liability under 42 U.S.C. § 1983 when it held that the City of Philadelphia could be subject to liability for a decision of lower level officials to delay extinguishing a fire which erupted during an armed confrontation with the radical MOVE organization, when the Mayor, the acknowledged final policymaker, ordered that the fire be promptly extinguished and never acquiesced in any decision to the contrary?

LIST OF ALL PARTIES

The Petitioner herein is the City of Philadelphia.

The Respondents are:

Ramona Africa;

Alfonso Leaphart, Administrator of the Estate of Vincent Lopez Leaphart, a/k/a John Africa;

Louise James;

W. Wilson Goode, Mayor, City of Philadelphia;

Leo A. Brooks, former Managing Director, City of Philadelphia;

Gregore Sambor, former Police Commissioner, City of Philadelphia;

William C. Richmond, former Fire Commissioner, City of Philadelphia;

Lt. Frank Powell;

Police Officer William Klein;

Police Officer Michael Tursi;

Sgt. Albert Revel;

Sgt. Edward Connor;

Corporal Morris Demsko;

State Trooper Richard Reed;

Commonwealth of Pennsylvania;

Richard Thornburgh, former Governor,

Commonwealth of Pennsylvania;

Jay Cochran, Commissioner of State Police,
Commonwealth of Pennsylvania; and

E.I. DuPont de Nemours and Company.

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NO.

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City of Philadelphia,

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vs.

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Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

Petition For Writ Of Certiorari

Petitioner, City of Philadelphia, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered on March 6, 1995, which affirmed in part, reversed in part and dismissed in part the judgments of the United States District Court for the Eastern District of Pennsylvania entered on January 25, 1994 and February 1, 1994.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit, entered April 3, 1995 is reported at 49 F.3d 945, 982 (3d Cir. 1995). It is reprinted in the Appendix hereto, App., Exhibit 1, A-1.

The decision of the United States Court of Appeals for the Third Circuit, entered March 6, 1995, is reported at 49 F.3d 945 (3d Cir. 1993). It is reprinted in the Appendix hereto, App., Exhibit 2, A-6.

The Judgment of the United States Court of Appeals for the Third Circuit, entered March 6, 1995 is not reported. It is reproduced in the Appendix hereto, App., Exhibit 3, A-89 .

The decision of the United States District Court for the Eastern District of Pennsylvania (Pollak, J.), entered February 1, 1994, is not reported. It is reproduced in the Appendix hereto, App., Exhibit 4, A-94 .

The decision of the United States District Court for the Eastern District of Pennsylvania (Pollak, J.), entered January 25, 1994, is reported at 849 F.Supp. 331 (E.D. Pa. 1994). It is reprinted in the Appendix hereto, App., Exhibit 5, A-112 .

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 42 U.S.C. § 1983 (claim of civil rights violation under color of state law); and 28 U.S.C. § 1367 (supplemental jurisdiction).

The United States Court of Appeals for the Third Circuit had jurisdiction over the appeal regarding denial of qualified immunity based upon the collateral order doctrine,

Mitchell v. Forsyth, 472 U.S. 511 (1985). It had jurisdiction to hear the interlocutory appeal of the City of Philadelphia regarding municipal liability under § 1983 based upon 28 U.S.C. § 1292(b).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1983. **Civil Action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arose out of an attempt by the City of Philadelphia to respond to the actions of a violent protest group known as MOVE who had been active in the City of Philadelphia for over two decades.

A. Facts

1978 Incident With Move

In 1978, pursuant to a court order, the City of Philadelphia attempted to evict MOVE members from a house in a section of the city known as Powelton Village. The MOVE members, however, fiercely resisted the attempt and a gun battle broke out. As a result, one police officer was

killed and several other officers and firefighters were wounded and injured.

Following the gun battle, nine MOVE members were tried and convicted for the murder of the police officer. Their convictions were upheld on appeal.

MOVE's Disruption In The Neighborhood

By the early 1980s, MOVE members were residing in West Philadelphia at 6221 Osage Avenue. By any standard, they were a disrupting neighborhood force. For instance, they used loudspeakers at all hours of the day and night to threaten neighbors and to express their anger that the nine MOVE members were in jail. They also threatened the mayor, calling him "a nigger motherfucker" and assured him that they had a bullet for him "to blow his motherfucking head off". They further threatened, "[i]f we have to, we will go down to City Hall and put six in his head." In addition, they threatened to kill any police officer who came near their house. The MOVE members further threatened neighbors by claiming that they had wired the entire block with explosives and that they would blow up the entire block if any neighbor spoke with the press or the police. MOVE members were seen on the roof of their house with weapons. They also were seen carrying sandbags and other construction paraphernalia into the house. In addition, the windows of the house had been blocked with wooden slats and aerial photographs showed that a military-styled bunker had been constructed on the roof.

The City Determines To Respond

The City of Philadelphia determined that it had to respond to MOVE and to the threats. The Mayor gathered a group of City officials together in order to develop a plan to respond to MOVE. Arrest and search warrants were secured. After they were issued on May 11, 1985, the City instituted a plan to execute the warrants. Prior to executing the plan, MOVE rebuffed the Mayor's efforts to negotiate with them. In addition, the Civil Affairs Unit of the Police Department

received a hand-written letter, signed by Respondent Ramona Africa, warning that any police raids on MOVE would fail and threatening that police officers "would find smoke, gas, fire and bullets. Before we let you mutha fuckas make an example of us, we will burn this mutha fuckin house down and burn you up with us."

The Original Plan

The initial plan to execute the warrants consisted of evacuating the neighborhood, requesting a peaceful surrender, and, if necessary, using tear gas to force the MOVE members from the house. Since the bunker was on the roof, it was decided that the police would insert tear gas through holes made in the sides of the adjacent houses.[1]

To provide cover for the officers who were responsible for entering the adjoining houses and creating the holes, the fire department was to aim water hoses at the bunker while the police fired smoke canisters around the house. Rather than requiring the police officers to drill holes into the walls and exposing them to assault while drilling, small explosives were to be used to create the holes. Then, tear gas would be injected into 6221 Osage Avenue and the occupants would be forced out.

The Plan Is Instituted

On May 12, 1985, consistent with the City's plan, the neighborhood residents were evacuated. Early the next morning, police officers and fire fighters took up their positions around the house. Around 5:30 a.m., the Police Commissioner announced over a bullhorn that the police had arrest warrants for four persons in the house and that they had fifteen minutes to surrender.

MOVE responded over their loudspeaker that they

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[1] The houses on that block were row homes which shared common walls.

would not surrender and one MOVE member yelled:

> You're going to be laying in the street bleeding in the street. Come on in and get us. We're going to kill you where you stay, where you lay. We see you on the roof. We know you're in those houses.

The MOVE members did not surrender in fifteen minutes. Thus, the plan to use tear gas was activated with the firing of tear gas and smoke projectiles at the house while the fire department began to squirt water onto the roof of the house and to provide cover for the insertion teams.

The Plan Is Thwarted

MOVE responded with gunfire at the police. Muzzle flashes were seen from the bunker atop the roof. A massive gun battle ensued and lasted for at least an hour and a half.

Meanwhile, the plan to insert the tear gas from the adjoining houses was thwarted because the walls of the MOVE house were fortified. Thus, a usable pathway through which to insert tear gas could not be created.

Consequently, the City's original plan of action was abandoned, and the officers who attempted to insert the tear gas retreated. The MOVE members gave no indication that they would surrender.

The City Looks At Alternate Plans

Late in the day, the Managing Director, the Police Commissioner, the Fire Commissioner and other city officials and police officers, discussed alternative ways to remove the bunker and to proceed against the MOVE members. Their discussions included whether to let the situation remain in suspense overnight and continue the efforts to execute the warrants the next morning. They determined, however, that it would be too difficult to secure the neighborhood through the night due, *inter alia*, to the darkness and exhaustion of the

police officers. In addition, they believed that MOVE might escape through tunnels rumored to have been dug under the neighborhood.

They also considered and rejected as too dangerous other means of executing the warrants. Their considerations included using a crane to remove the bunker, attacking from above the roof, attacking from the front or back of the house and placing an explosive in the bunker.

The officials then focused on a plan to drop a "satchel charge" onto the bunker from a helicopter and to create a hole in the roof. Although they discussed whether a fire could start, they were satisfied that the risk was negligible.

The Mayor Approves The Alternate Plan

The Managing Director informed the Mayor of the alternative plan to use the satchel charge, and the Mayor approved it.

At about the same time, neighbors used a bullhorn to plead with the MOVE members to surrender. They received no response from their pleadings.

The Alternate Plan Is Instituted

Thus, the plan to use the satchel charge went forward. Rather than destroying the bunker, however, the satchel charge missed it entirely. The Mayor watched the explosion on television from his City Hall office. The Managing Director and the Police Commissioner observed it from the balcony of a nearby building, and the Fire Commissioner saw it from the street.

At some point after the satchel charge was dropped, a fire on the roof was observed. By this time both the Police Commissioner and the Fire Commissioner were on the street together. The Police Commissioner asked Fire Commissioner if the fire could be allowed to consume the bunker and still be controlled. The Police Commissioner explained:

> I wanted to get the bunker. I wanted to be able to somehow have tactical superiority without sacrificing any lives if it were at all possible. And in that vein I asked him - I'm a police officer. I am not a fire fighter. I asked him for his concurrence, that if we let the roof burn to get the bunker, could we then control the fire. And whatever the response was, it was in the affirmative.

In Re: City of Philadelphia Litigation, 49 F.3d 945, 951 (3d Cir. 1995); A-11.

The Fire Commissioner's testimony corroborates the Police Commissioner recollection.

> I told him essentially that, that I though we could contain the spread at that point. He said, 'Let's let the bunker burn to eliminate that high ground advantage and the tactical advantage of the bunker', and I said, 'Okay' . . . He made the recommendation, . . . and I concurred.

Id., 49 F.3d at 951; A-18 .

The fire was allowed to burn until the Mayor contacted the Managing Director and inquired regarding the fire. The Mayor informed the Managing Director that, notwithstanding whether they had accomplished their objectives, he wanted the fire extinguished immediately. Once the Mayor ordered that the fire be extinguished, the fire fighters began fighting the fire. However, they encountered many problems. There was a live electrical wire in the vicinity; the water itself caused visibility problems; and the water caused the fire to bank downward into the house.

The fire then went out of control, and the City was unable to contain it. A total of eleven persons died in the fire and sixty-one houses were destroyed. Ramona Africa and a young boy were the only MOVE survivors. Ms. Africa was

taken into custody and subsequently found guilty of crimes related to the incident.

B. Proceedings Below

Following the events of May 12, 1985, many suits were filed in the United States District Court for the Eastern District of Pennsylvania by the homeowners, the estates of the individuals in the house and the two survivors. The court consolidated, for purposes of appeal, all the cases under the title of *In Re: City of Philadelphia Litigation*, Master File No. 85-2745. Magistrate Judge Hall presided over discovery.

At the close of discovery and settlement conferences, three cases remained in the federal court, *Africa v. City of Philadelphia*, Civil Action No. 87-2678; *Leaphart v. City of Philadelphia*, Civil Action No. 87-2756; and *James v. City of Philadelphia*, Civil Action No. 85-3528. Motions for summary judgment were filed in each of the cases.

Summary judgment with regard to all events that occurred prior to the time that the fire broke out was granted to all defendants. The trial court, however, denied the defense of qualified immunity asserted by the Managing Director, the Police Commissioner and the Fire Commissioner with regard to the events which occurred surrounding the fire. It also denied the City of Philadelphia's motion for summary judgment regarding the § 1983 claim as it related to actions taken after the fire started.

Upon motion from the City of Philadelphia, the trial court on February 1, 1994, entered final judgment in favor of the Mayor, Lt. Frank Powell, Police Officer William Klein, Police Officer Michael Tursi, Sgt. Albert Revel, Sgt. Edward Connor, Corporal Morris Demsko and State Trooper Richard Reed in the *Africa* matter. On February 2, 1994, final judgment was entered in favor of the Mayor and Lt. Frank Powell in the *James* matter and in favor of the Mayor, Lt. Powell, Police Officer William Klein, Police Officer Michael Tursi and Sgt. Albert Revel in the *Leaphart* matter. By the same Orders, the trial court certified that the denial of the City

of Philadelphia's summary judgment motion involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation in this matter.

Timely appeals were filed by the remaining individual defendants challenging the denial of qualified immunity. In addition, the City of Philadelphia filed a Petition for Permission to Appeal in each of the three cases, and the Petitions were granted.

On March 6, 1995, the United States Court of Appeals for the Third Circuit issued its opinion and Judgment. The City of Philadelphia, Ramona Africa, Louise James, and Vincent Leaphart petitioned for rehearing. The United States Court of Appeals for the Third Circuit denied the petitions on April 3, 1995.

The City of Philadelphia timely files this Petition for a Writ of Certiorari.

ARGUMENT

By holding that the City of Philadelphia can be liable, under 42 U.S.C. § 1983, for the acts of the Managing Director, the Fire Commissioner and/or the Police Commissioner even though the Mayor, the acknowledged final policymaking authority, countermanded any such decision and ordered that the fire be put out immediately, the Court of Appeals for the Third Circuit in a sharply divided opinion directly conflicted with this Court's holdings in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1969); and *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). Therefore, a writ of certiorari should issue under Supreme Court Rule 10.1(c).

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN DIRECT CONFLICT WITH THE LAW REGARDING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983, AS INTERPRETED BY THIS COURT.

Municipal liability under § 1983 can be imposed only for actions for which the municipality is responsible. *Pembaur v. City of Cincinnati*, 475 U.S. at 479-480. "Congress did not intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). Thus, municipal liability under § 1983 cannot be imposed based upon the application of the doctrine of *respondeat superior*. *Id.* "The 'official policy' requirement set forth in *Monell* was intended to distinguish the acts of the *municipality* from the acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible." *Pembaur*, 475 U.S. at 479-480 (emphasis in original).

While *Pembaur* recognized that municipal liability, under the appropriate circumstances, could be imposed for a single decision, the *Pembaur* plurality also hastened to emphasize "that not every decision by municipal officers automatically subjects the municipality to § 1983 liability." *Pembaur*, 475 U.S. at 480-481. Rather, "municipal liability attaches *only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered*." *Id.* (emphasis supplied). In other words, it is insufficient to claim that a policymaking official has discretion in the exercise of a particular function. Rather, plaintiff must prove that the official is "responsible for establishing final government policy respecting [the] activity in question." *Id.*, 475 U.S. at 483.

The *Pembaur* Court defined more precisely when a decision on a single occasion was sufficient to establish policy by setting forth guiding principles. Those principles were

summarized in *City of St. Louis v. Praprotnik, supra.*

> First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Id.* at 483 (plurality opinion). Third, whether a particular official has "final policymaking authority" is a question of *state law*. *Ibid.* (plurality opinion). Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business. *Id.* at 482-483, and n. 12 (plurality opinion).

Id., 485 U.S. at 123 (emphasis in the original).

Praprotnik is especially instructive in this matter. In that case, the plaintiff sought damages from the municipality under § 1983 for actions taken against him as an employee of the City of St. Louis. He claimed that the City should be held liable based upon the actions of his supervisors. The Court examined the St. Louis City Charter to determine whether, under state law, the supervisors were the final policy making authority. The Court concluded that the Mayor and Aldermen - not the supervisors - possessed final authority.

> . . . it appears that the Mayor and Aldermen are authorized to adopt such ordinances relating to personnel administration as are compatible with the City Charter. . . The Civil Service Commission, for its part, is required to 'prescribe. . . rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in

> pursuance thereof, and not inconsistent therewith." § 7(a), App. 62. Assuming that applicable law does not make the decisions of the Commission reviewable by the Mayor and Aldermen, or vice versa, one would have to conclude that policy decisions made either by the Mayor and Aldermen or by the Commission would be attributable to the City itself.

Praprotnik, 485 U.S. at 126. Application of the law as set forth by this Court requires the conclusion that municipal liability cannot be imposed in this situation and that the appeals court failed properly to apply the law.

A. The Court Of Appeals Inappropriately Applied The Principle Of *Respondeat Superior* To Municipal Liability Under § 1983 When It Found That The Commissioners And The Managing Director Had "Sufficient Authority" To Subject The City Of Philadelphia To Liability.

The majority opinion of the Third Circuit regarding municipal liability is limited to one paragraph consisting of four sentences. Without addressing Pennsylvania law at all, the majority simply stated that the standards had been met, affirming the trial court's decision regarding municipal liability.

> Because I cannot say, as a matter of law, that there has been no Fourth Amendment violation, *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), does not relieve the city of liability. Under *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986), we must consider whether the acts of the municipal officers may be attributed to the city. I believe that their actions meet the standards outlined in those cases, and I hold the City responsible for the

> acts of these officials. Furthermore, under *Owen v. City of Independence*, 445 U.S. 622, 650 (1980), the city does not have qualified immunity from liability even if it can show that the officials themselves are entitled to immunity from personal liability under § 1983.

In Re: City of Philadelphia Litigation, 49 F.3d at 975; A-72 .

The trial court had concluded that "the suability of Managing Director Brooks means also that the City is suable by virtue of the potential determination that Managing Director Brooks concurred for a time in the fire." *In Re: City of Philadelphia Litigation*, 849 F.Supp. 331, 345 (E.D. Pa. 1994), *aff'd in part, rev'd in part and dismissed in part*, 49 F.3d 945 (3d Cir. 1995). The trial court further found that with regard to the Fire Commissioner and the Police Commissioner:

> if it were the case that the Commissioners made the decision without any overt acquiescence of the Managing Director until the point arrived at which that decision was superseded, I would conclude that they had sufficient authority to make final decisions attributable to the City of Philadelphia.

Id., 849 F.Supp. at 347; A-142. The argument that an official has "sufficient authority to make final decisions attributable to the City" is the same type of argument that was specifically rejected by this Court in *Praprotnik*:

> This theory would apparently ignore state law, and distinguish between "high" officials and "low" officials on the basis of an independent evaluation of the extent to which a particular official's actions have "the potential of controlling governmental decisionmaking" or are "perceived as the actions of the city itself." Whether this evaluation would be conducted by judges or juries, we think, the legal test is

> too imprecise to hold much promise of consistent adjudication or principled analysis. We can see no reason, except perhaps a desire to come as close as possible to respondeat superior without expressly adopting that doctrine that could justify introducing such unpredictably into a body of law that is already so difficult.

Praprotnik, 485 U.S. at 125, n.2.

To presume that municipal liability can be imposed on the basis that the Managing Director "concurred for a time in the fire" before the decision was superseded by the Mayor is nothing more than imposition of municipal liability based upon the doctrine of *respondeat superior* - a theory of liability rejected long ago under 42 U.S.C. § 1983. Likewise, the conclusion that during the period of time that the Commissioners decided to allow the fire to burn, prior to the superseding order of the Mayor to put the fire out, the Commissioners had "sufficient authority to make final decisions attributable to the city" does not determine who the final policymaker was under state law. Rather, the ruling goes directly counter to this Court's prior and longstanding ruling that municipal liability cannot be imposed on the basis of *respondeat superior*.

In this case, it is clear that the Mayor had the final policymaking authority because when he said that the fire must be put out whether or not the objectives had been achieved, the fire was put out. Obviously, the Managing Director, the Fire Commissioner and the Police Commissioner all knew that their opinions on the matter were subject to the veto of the Mayor, and when the Mayor gave the order, his order was followed by the three of them. No evidence was provided by the plaintiffs in these cases that would suggest that any one of the three officials acted in any way contrary to the Mayor's order after he gave it. Clearly, the final policymaker, in this specific situation, was the Mayor. The law, as set forth by this Court, precludes the attempts by the plaintiffs and the courts below to place that responsibility in

the hands of his subordinates through the doctrine of *respondeat superior*. Thus, the decision of the Court of Appeals for the Third Circuit directly contradicts the well-settled law of this Court which precludes imposing § 1983 liability on a municipality on the basis of *respondeat superior*.

B. Under State Law, The Mayor Was The Final Policymaking Authority In This Situation, Precluding The Ability Of The Appellate Court To Subject The City To Liability Under § 1983 For Any Actions Taken By Any Other City Employee.

State law places the final policymaking authority for law enforcement in the hands of the Mayor. Specifically, the Philadelphia Home Rule Charter[2] designates that "[t]he Mayor shall be the chief executive officer of the City. He shall be responsible for the conduct of the executive and administrative work of the City and for law enforcement within its boundaries." 351 Pa. Code § 4.4-100. The Annotation to that section explained that "[t]he cornerstone of the strong-mayor form of government is the vesting of *ultimate responsibility* for the conduct of the executive and administrative work and law enforcement in the Mayor." Annotation, 351 Pa. Code § 4.4-100 (emphasis supplied). Significantly, the Charter specifically designates "law enforcement" as one of the functions for which the Mayor is ultimately responsible and does not include it in a catch-all phrase such as "executive and administrative work."

Consistent with the strong-mayor form of

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[2] The government of the City of Philadelphia is set forth in the Philadelphia Home Rule Charter which was adopted by the citizens of the City in 1951. Under the Philadelphia Home Rule Charter, the citizens of Philadelphia established a strong-mayor form of government for the City of Philadelphia. *See*, Philadelphia Home Rule Charter, 351 Pa. Code §3.3-204, Annotation (1951) (the "Charter").

government, the Mayor appoints the Managing Director.[3] 351 Pa. Code § 3.3-204. The Managing Director, with the approval of the Mayor, appoints the Police Commissioner and the Fire Commissioner, 351 Pa. Code § 3.3-206, and also supervises them.

> Section 5-100. Supervisory Powers. The Managing Director shall exercise supervision over all of those departments whose heads he appoints and the boards and commissions connected with such departments and shall be the contact officer between the Mayor and such departments, boards and commissions.

351 Pa. Code § 5.5-100. Indeed, the Annotation to this section confirms that the chain of command places the ultimate authority with the Mayor. " The department heads are responsible to the Managing Director who in turn is responsible to Mayor." 351 Pa. Code ¶ 5.5-100, Annotation.

The Charter clearly places in context the roles of the Mayor, the Managing Director and the Commissioners. The Mayor, as the chief executive officer of the City, possesses the ultimate responsibility for the conduct of the executive branch of government. His decisions supersede any decision made by the Managing Director, the Police Commissioner or the Fire Commissioner. This is especially so when, as here, the City's actions involved the coordination of several departments under the Mayor's control and not just one department responding, independent of any other department in the City. Indeed, the trial court recognized that the Mayor was the only relevant policymaker when it concluded that the decision to drop the explosive device had to be ratified by the Mayor before it could be implemented. *In Re: City of Philadelphia Litigation*, 849 F.Supp. at 337 and 339. Clearly, the Mayor was the final policymaking authority and any persons who served under him could not subject the City to

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[3]The Charter also provides the Mayor with the ability to remove the Managing Director. 351 Pa. Code § 9.9-201.

liability by virtue of any decision that they made.

The uncontroverted evidence is that the Mayor's only action regarding the fire was his order to "put it out". He never acquiesced in any decision to the contrary. *Id.*, 849 F.Supp. at 337-338. Furthermore, the evidence is clear that when the Managing Director received that order, he conveyed it to the Fire Commissioner and the Police Commissioner. It is uncontroverted that both commissioners acted upon the order from the Mayor. No evidence in the record suggests that either of them disobeyed the order.

This situation is unlike *Praprotnik*, where the Court found that the Mayor, the Aldermen and the Commission all had final decision making power because none of them could review and overrule the decisions of the other. Here, the Mayor always retained the authority to review and reverse the decision of the Police Commissioner, the Fire Commissioner and the Managing Director. Indeed, he did just that when he ordered the fire to be put out. Thus, in order to determine whether the City of Philadelphia is liable under § 1983 in this situation, the court should have looked to the orders issued by the Mayor and not the decisions of any other person.

1. The City's actions were a one time occurrence in response to the hostilities of MOVE. The Mayor was the final policymaking authority, precluding municipal liability for any actions not authorized by the Mayor.

Although the appellate court decision addresses only the last event of the day on May 13, 1985, it must be examined in the context of the whole day and remembered that it was one of a series of actions taken to respond to the increasing hostilities of MOVE on Osage Avenue. Throughout this series of events, Mayor Goode at all times retained his authority to approve the decisions. Indeed, the trial court agreed with the recommendation of Magistrate Judge Hall that the events earlier in the day in which the City attempted to drill holes for tear gas in adjoining walls constituted a reasonable use of force. *Africa v. City of*

Philadelphia, 809 F.Supp. 375, 378 (E.D. Pa. 1992). Likewise, the trial court adopted Magistrate Judge Hall's analysis that the dropping of the explosive device was reasonable under the standards set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985). *In Re: City of Philadelphia Litigation*, 849 F.Supp. at 338-339.[4]

Moreover, the court below recognized that the individual actions were a part of the overall plan to respond to MOVE, initiated at the Mayor's instruction. *Africa v. City of Philadelphia*, 809 F.Supp. at 377. Additionally, the Court recognized that alterations to the plan were approved by the Mayor. *Ibid.* Similarly, the decision regarding fighting the fire was part of the plan and cannot be characterized or seen as the independent action of the Fire Department, or any other City department. It was a part of the City's policy for responding to the MOVE situation, and the Mayor, after receiving input from his staff, made the decisions regarding the response. No evidence was provided by plaintiffs even to suggest that he relinquished that role.

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[4] Magistrate Judge Hall's analysis as set forth in his Report and Recommendation concluded:

> a reasonable person in each of the defendants' positions could have believed that the use of an explosive device to remove the bunker from the roof and to provide access to the interior of the house for tear gas was necessary to 'prevent death or serious bodily injury' to the police officers on the scene or other persons. In addition, based on the information available to them regarding MOVE's threats of violence and MOVE's use of force in resisting arrest, they could have believed that the use of the bomb would be conduct that was consistent with the principles embodied in Section 508 and *Garner*. . . .

In Re: City of Philadelphia Litigation, 849 F.Supp. at 337.

Indeed the trial court recognized that the events were a part of the plan of action. The court even recognized that the various decisions had to be ratified by the Mayor. *In Re: City of Philadelphia Litigation*, 849 F.Supp. at 339 ("I start with the testimony of Managing Director Brooks who in effect had been the superintendent of Police Commissioner Sambor's decision to drop the bomb, *a decision that had to be ratified of course by the Managing Director and in turn by the Mayor before being carried out.*") (emphasis added); *Id.*, 849 F.Supp. at 337 ("That plan turned out not to be feasible, and then there was developed the plan which Police Commissioner Sambor adopted -- and got the agreement of Managing Director Brooks, who in turn got the agreement of the Mayor..."). Thus, in this situation, where the final policymaking decision rested with the Mayor, municipal liability could attach only where the Mayor ordered or approved action that was unconstitutional. The evidence of record reveals that the Mayor instructed that the fire be put out and did not acquiesce in any decision to the contrary. No issue of material fact regarding the Mayor's action exists. Therefore, liability against the City of Philadelphia cannot be imposed. The court's ruling directly contradicts this Court's prior rulings regarding municipal liability under § 1983.

If the court's decision is allowed to stand, it would have the force and effect of imposing municipal liability based upon the doctrine of *respondeat superior*. The Supreme Court has never wavered in its holding that liability under § 1983 cannot be based upon the doctrine of *respondeat superior*. *Monell*, 436 U.S. at 691; *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur*, 475 U.S. at 479; *Praprotnik*, 485 U.S. at 123; *Jett v. Dallas Independent School District*, 491 U.S. 701, 736 (1989). In determining whether an official's action can impose municipal liability, the Court has refused to end the analysis at a determination of whether the official had discretion to act or sufficient authority to make a decision. *Pembaur*, 475 U.S. at 482. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." *Praprotnik*, 485 U.S. at 126.

Contrary to the instructions from this Court, the court below concluded that the City of Philadelphia can be subject to § 1983 liability based upon the discretionary acts of the Managing Director, the Police Commissioner or the Fire Commissioner. In so doing, the court incorrectly imposed § 1983 liability based upon the doctrine of *respondeat superior*.

The *Praprotnik* Court recognized that determination of the identity of the final policymaker will not always be an easy task. It, therefore, set forth principles to assist in the determination of whether the official's discretionary actions are to be considered final.

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Praprotnik, 485 U.S. at 127.

Applying these principles to the situation before this Court, the Mayor was the final policymaking authority. The Mayor did not delegate that authority to anyone else. Rather, he retained the authority to determine the City's actions in all the decisions that were made, including the decision regarding the fire. The Managing Director, the Fire Commissioner and the Police Commissioner were constrained by the Mayor's decision as both the trial court and the appellate court recognized. To impose municipal liability based upon any actions taken by any official other than the Mayor is to apply the doctrine of *respondeat superior*, in contravention of the law. Thus, the courts below wrongly concluded that, in this situation, municipal liability could be imposed based upon the acts of the Police Commissioner, Fire Commissioner or the Managing Director.

2. The Mayor, as the final policymaking authority in this situation, ordered no action that violated plaintiffs' constitutional rights. Thus, municipal liability, under § 1983 could not be imposed.

As this Court decided in *Pembaur* and reaffirmed in *Praprotnik*, "municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.'" *Praprotnik*, 485 U.S. at 123 (quoting *Pembaur*, 475 U.S. at 480). In this case, plaintiffs provided no evidence that the Mayor took any action regarding the decision to put out the fire which could remotely suggest a constitutional violation. The court found no evidence that the Mayor's actions constituted any constitutional violation. The only evidence regarding the Mayor's action is that he ordered the fire to be put out notwithstanding whether the objective of neutralizing the bunker had been accomplished. Respondents can state no officially sanctioned acts or orders which would demonstrate that constitutional violations occurred. Thus, the courts erroneously concluded that municipal liability under § 1983 could attach based upon the actions of the Police Commissioner, the Fire Commissioner or the Managing Director.

The decision regarding the fire was one of several decisions in an overall plan to respond to the increasing hostilities of MOVE. Clearly under Pennsylvania law, the Mayor was the final policymaking authority in this situation. Only the Mayor, as the final policymaking authority for implementing the plan, could subject the City of Philadelphia to liability under § 1983. The Mayor's action in response to the fire did not violate any constitutional rights. No genuine issue of material fact exists regarding the Mayor's actions. Thus, the decision of the court of appeals directly conflicts with the law set forth by this Court regarding when a municipality can be held liable under § 1983 liability.

CONCLUSION

For all of the reasons set forth above, Petitioner, City of Philadelphia, respectfully requests that this Honorable Court issue an order granting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Chief Deputy City Solicitor, Appeals
Counsel of Record

E. JANE HIX, *Deputy City Solicitor*
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Appendix Exhibit 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re CITY OF PHILADELPHIA
LITIGATION. (Three Cases)

Ramona AFRICA

v.

CITY OF PHILADELPHIA; Willie Goode; Leo A. Brooks; Gregore Sambor; William C. Richmond; Frank Powell, Lt.; William Klein, Officer; Michael Tursi, Officer; Albert Revel, Sgt.; Edward Connor, Sgt.; Morris Demsko, Corporal; Richard Reed, State Trooper, Individually and in their present and/or former official capacities,

Leo A. Brooks, Appellant in No. 94-1277,

Ramona Africa, Appellant in No. 94-1322,

City of Philadelphia, Appellant in
Nos. 94-1280 and 94-1377,

William C. Richmond, Appellant
in No. 94-1279,

Alfonso LEAPHART, Administrator
of the estate of Vincent Lopez
Leaphart, a/k/a John Africa

CITY OF PHILADELPHIA; W. Wilson Goode, Mayor, City of Philadelphia; Leo A. Brooks, Former Managing Director, City of Philadelphia; Gregore J. Sambor, Former Police Commissioner, City of Philadelphia; William C. Richmond,

Fire Commissioner, City of Philadelphia; Frank Powell; William Klein; Michael Tursi; Albert Revel; Commonwealth of Pennsylvania; Richard Thornburgh, Former Governor, Commonwealth of Pennsylvania; Jay Cochran, Commissioner of State Police, Commonwealth of Pennsylvania; Richard Reed; Morris Demsko; E.I. DuPont de Nemours and Company,

Alfonso Leaphart, Administrator of the Estate of Vincent Lopez Leaphart, a/k/a John Africa, Appellant in No. 94-1321,

City of Philadelphia, Appellant in Nos. 94-1378, 94-1233, and 94-1272,

William C. Richmond, Appellant in No. 94-1276.

Louise JAMES

v.

Frank POWELL; Gregore J. Sambor; Leo Brooks; William C. Richmond; W. Wilson Goode; City of Philadelphia; State of Pennsylvania; DuPone de Mours, E.I. & Company

v.

Ramona Johnson AFRICA; Alphonso Robbins Africa, Third-Party Defendants

Louise James, Administratrix of the Estate of Frank James, Appellant in No. 94-1320,

City of Philadelphia, Appellant in Nos. 94-1229 and 94-1379, Gregore Sambor, Appellant in No. 94-1230, Leo A. Brooks, Appellant in No. 94-1231, William C. Richmond, Appellant in NO. 94-1232.

Nos. 94-1277 to 94-1280, 94-1322, 94-1377, 94-1233, 94-1272, 94-1276, 94-1321, 94-1378, 94-1229 to 94-1232, 94-1320 and 94-1379.

United States Court of Appeals, Third Circuit.
Argued Nov. 3, 1994.
Decided March 6, 1995.
Sur Petition for Rehearing April 3, 1995.

Affirmed in part and reversed in part; appeal dismissed in part.

Greenberg, Circuit Judge, dissented in part.

Scirica, Circuit Judge, filed opinion concurring in part and dissenting in part.

Lewis, Circuit Judge, filed opinion concurring in part and dissenting in part.

Before: GREENBERG, SCIRICA, and LEWIS, Circuit Judges.Andre L. Dennis (argued), Jeffrey M. Lindy, Raymond S. Wierciszewski, Stradley, Ronon, Stevens & Young, Philadelphia, PA, for appellant/appellee Ramona Africa.

Fincourt B. Shelton (argued), Fincourt B. Shelton and Associates, Darby, PA, for appellant/appellee Louise James.

Rosemarie Rhodes (argued), Harper & Paul, Philadelphia, PA, for appellant/appellee Alfonso Leaphart.

Joseph A. Dworetzky, Acting City Sol., Michael F. Eichert, Divisional Deputy City Sol., E. Jane Hix (argued), Deputy City Sol., City of Philadelphia, Law Dept., Philadelphia, Pa, for appellant City of Philadelphia.

Nolan N. Atkinson, Jr. (argued), Frank E. Noyes, II, Duane, Morris & Heckscher, Philadelphia, PA, for appellee W. Wilson Goode.

Steven R. Waxman (argued), Kleinbard, Bell & Brecker, Philadelphia, PA, for appellant Leo A. Brooks.

John W. Morris (argued), Pennsylvania, PA, for appellant Gregore Sambor.

Peter C. Kennedy (argued), James M. Marsh, Hecker Brown Sherry and Johnson, Philadelphia, PA, for appellant William C. Richmond.

Richard D. Malmed, Philadelphia, PA, for appellee Frank Powell.

E. Harris Baum, John R. O'Donnell, Zarwin & Baum, P.C., Philadelphia, PA, for appellee William Klein.

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, Circuit Judges

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The petition for rehearing filed by the appellant-appellee, City of Philadelphia, in the above-captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit

of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

_____

Circuit Judge

Appendix Exhibit 2

UNITED STATES COURT OF APPEALS
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CITY OF PHILADELPHIA; W. Wilson Goode, Mayor, City
of Philadelphia; Leo A. Brooks, Former Managing Director,
City of Philadelphia; Gregore J. Sambor, Former Police

Commissioner, City of Philadelphia; William C. Richmond, Fire Commissioner, City of Philadelphia; Frank Powell; William Klein; Michael Tursi; Albert Revel; Commonwealth of Pennsylvania; Richard Thornburgh, Former Governor, Commonwealth of Pennsylvania; Jay Cochran, Commissioner of State Police, Commonwealth of Pennsylvania; Richard Reed; Morris Demsko; E.I. DuPont de Nemours and Company,

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Louise JAMES

v.

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City Sol., City of Philadelphia, Law Dept., Philadelphia, Pa, for appellant City of Philadelphia.

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John W. Morris (argued), Pennsylvania, PA, for appellant Gregore Sambor.

Peter C. Kennedy (argued), James M. Marsh, Hecker Brown Sherry and Johnson, Philadelphia, PA, for appellant William C. Richmond.

Richard D. Malmed, Philadelphia, PA, for appellee Frank Powell.

E. Harris Baum, John R. O'Donnell, Zarwin & Baum, P.C., Philadelphia, PA, for appellee William Klein.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

GREENBERG, Circuit Judge.

These consolidated appeals have been taken from judgments and orders in three civil actions against the City of Philadelphia and certain of its former officials and employees. The plaintiffs' claims rose out of an attempt by the Philadelphia Police Department on May 13, 1985, to execute search warrants and arrest warrants at a premises in

Philadelphia occupied by a group known as MOVE. After hours of gunfire and failed attempts to inject tear gas into the residence in which the MOVE members had barricaded themselves, police officers dropped an explosive device on the roof of the house. The ensuing fire killed 11 persons, including five children, in the residence and destroyed dozens of homes in the vicinity.

The plaintiffs' appeal from the district court's grant of summary judgment on qualified immunity grounds in favor of certain of the defendants with respect to claims arising from the dropping of the explosive device. Philadelphia Managing Director Leo A. Brooks, Police Commissioner Gregore Sambor, and Fire Commissioner William C. Richmond appeal from the district court's denial of their motions for summary judgment on qualified immunity grounds with respect to claims under 42 U.S.C.§1983 arising from their alleged decisions to let the fire burn.[1] They also appeal from the denial of their motions for summary judgment on state claims asserted against them. The city itself appeals from the denial of its motion for summary judgment.

The court is divided on the disposition of various issues and on certain issues there are majorities consisting of each of the three possible combination of judges. On other issues the court is unanimous. In this opinion I will set forth the ultimate conclusions reached and also set forth the majority view on some points and my own view on other points. Judges Scirica and Lewis are filing separate opinions. As a matter of convenience I largely will deliver this opinion in the

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[1] For simplicity and convenience, we will address these officials by the titles they held during the 1985 conflict even though they may no longer hold such titles. The Commonwealth of Pennsylvania and certain of its officials and employees also have been parties to this litigation but they are not involved in these appeals.

first person.

Judge Scirica and I conclude that all the individual defendants are immune because their actions on May 13, 1995, did not violate any clearly established constitutional rights of plaintiff Ramona Africa and decedents Frank James and Vincent Lopez Leaphart. Accordingly, we will affirm the grant of summary judgment to defendants Wilson Goode, the mayor of the city, and police officers Frank Powell and William Klein, and will reverse the denial of summary judgment on the section 1983 claims to defendants Brooks, Sambor, and Richmond. Judges Scirica and Lewis conclude that the City of Philadelphia is not entitled to summary judgment on the section 1983 claims and accordingly we will affirm the district court's denial of summary judgment to the city on those claims. Judge Lewis and I conclude that we do not have jurisdiction over the appeals from the district court's denial of summary judgment for Brooks, Sambor and Richmond on the state law claims based on letting the fire burn. Accordingly, we dismiss those appeals.

There also is a related property claim before us filed by Louise James seeking compensation for the destruction of the MOVE house. For the reasons we discuss below we all conclude that we do not have jurisdiction over the appeal from the dismissal of that claim. Consequently, we will dismiss for lack of jurisdiction James' appeal insofar as it relates to her property claim.

I. FACTUAL BACKGROUND

Because the motions for summary judgment involved the individual defendants' claims of entitlement to qualified immunity, the district court indicated that its rulings were based on the "plaintiff's well-documented version of the facts," as called for by *Good v. Dauphin County Social Serv., 891 F.2d 1087, 1094-95 (3d Cir. 1989).* This court since has

clarified that such a determination should be based on the undisputed facts as revealed by the record and on the plaintiff's version of the facts where there are disputes. *Melo v. Hafer, 13 F.3d 736, 745 (3d Cir. 1994)* ("If, after the summary judgment practice prescribed by that rule, the undisputed facts of record demonstrated entitlement to immunity, the Court would ignore the bare allegations of the complaint and grant summary judgment on grounds of immunity."); *see also Brown v. Grabowski, 922 F.2d 1097, 1110-11 (3d Cir. 1990), cert. denied, 501 U.S. 1218, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991).* In this case, the extensive record includes the discovery and investigative reports from a state grand jury and a special commission which studied the incident. These materials are particularly significant because Ramona Africa, the only surviving witness from inside the premises who has testified for the plaintiffs as to the events that occurred on May 13, 1985, has limited knowledge of the facts because she was in the cellar with the children for most of that day and did not hear any of the announcements made by either police officers or MOVE members. *See app. at 1362-65.*

The material undisputed facts are as follows. In 1978, pursuant to a court order, the city attempted to evict MOVE members from a residence in Powelton Village. However, the MOVE members resisted and a gunfight broke out. As a result, one police officer was killed and several other officers and fire fighters were wounded. Subsequently, nine MOVE members were convicted for the murder of this officer.

In the early 1980's MOVE members took up residence at 6221 Osage Avenue, Philadelphia. By any standard they were a disrupting neighborhood force. Some used loud speakers to communicate threats and dissatisfaction to their neighbors. Furthermore, the Probable Cause Affidavit (the Affidavit) supporting the issuance of the warrants executed on May 13, 1985, states that a MOVE member had threatened Mayor Goode, calling him a "nigger motherfucker" and

indicating that "we have a bullet for [Mayor Goode]... to blow his motherfucking head off. If we have to, we will go down to City Hall and put six in his head." App. at 2294. The Affidavit also states that the same MOVE member announced, "[w]e will kill any motherfucking cop that comes to the front, back or our goddamned roof," and threatened two police officers that if they "come back around here again, we'll kill you; put a bullet in your head." *Id.*

The Affidavit states further that several neighbors said that "they heard MOVE members say over the loudspeakers that they have wired the entire block with explosives and that if any neighborhood resident speaks with the press, or if the police take action against MOVE, MOVE will blow up the entire block." App. at 2295. Neighborhood residents states that they had seen a MOVE member on the roof with a weapon or a gun. App. at 2296. The Affidavit also notes that one of the MOVE members at 6221 Osage Avenue was on parole from a conviction for riot, terroristic threats, and possession of an instrument of crime. *Id.*

The Affidavit also states that in 1984, neighbors had observed MOVE members carrying sandbags into the Osage Avenue building. App. at 2301. The windows of the building had been blocked with wooden slats, and aerial photographs showed that a bunker had been constructed on its roof. App. at 1568, 2301.

The arrest and search warrants were issued on May 11, 1985, upon a judicial finding of probable cause. App. at 2291. After District Attorney Edward Rendell informed Mayor Goode that there was probable cause, the Mayor instructed Police Commissioner Sambor to develop a plan to execute the warrants. Goode testified that earlier that week, he attempted to negotiate with certain MOVE members but they rebuffed him with a message, "Now we are ready. Tell them to come on." App. at 897-901.

A few days prior to the confrontation, the Civil Affairs Unit of the Police Department received a hand-written letter signed with Ramona Africa's name.[2] App. at 1739-53.

The letter warned that any police raids on MOVE would fail, and threatened that "if [police officers] succeed in coming thru the walls they are going to find *smoke, gas, fire, and bullets.* Before we let you mutha fuckas make an example of us we will burn this mutha funckin house down and burn you up with us." App. at 1234, 1751.

Police Commissioner Sambor developed the initial plan to execute the warrants, which was to evacuate the neighborhood, request a peaceful surrender, and, if necessary, use tear gas to force the MOVE members from the house. App. at 1985-86. Because of the bunker on the roof, it was decided that the police would make holes in the sides of the house and insert tear gas through them rather than through the roof. App. at 1575-76, 1985. To provide cover for the "insertion teams," i.e., the officers who were to enter the adjoining houses and create the holes, the plan provided for the fire department to aim water hoses at the bunker while the police fired smoke canisters around the house. App. at 1456-58, 1771, 1986. Rather than having the officers drill holes into the walls of the house, thereby exposing them to assault while they were drilling, the plan called for "shape charges," or small explosives, to be used to create the holes. App. at 1416, 1570, 1986-87. Once they created the holes, it was expected that they would inject tear gas into the MOVE house and force out the occupants. App. at 1419, 1570, 1987.

On May 12, 1985, the city evacuated the

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[2] Ramona Africa denies having any knowledge of the letter, see app. at 1360, but she does not deny that the police received the letter prior to the day of confrontation.

neighborhood residents. App. at 2229. Beginning at approximately 3:00 a.m. the next morning, police officers and fire fighters took up their places around 6221 Osage Avenue. App. at 2230. At around 5:30 a.m., Police Commissioner Sambor announced over a bullhorn that the police had arrest warrants for four persons in the house and that they had 15 minutes to surrender. App. at 1609, 1764-69, 1856, 2036, 2230. MOVE members responded over the loudspeaker that they would not surrender, and one yelled:

> You're going to be laying in the street, bleeding in the street. Come on in and get us. We're going to kill you where you stay, where you lay. We see you on the roof. We know you're in those houses.

App. at 1093, 1777, 1791-92, 2037, 2230. After the 15 minutes lapsed, the police began to fire tear gas and smoke projectiles at the house while the fire department began to squirt water onto the roof of the house to provide cover for the insertion teams. App. at 1043-44, 1778-79, 2230, 2037-38.

A few minutes later, someone in the MOVE house fired shots at the police. App. at 2038, 2230. Muzzle flashes were seen from the bunker atop the roof. App. at 1780-85, 1791, 1797-98, 1826-29, 2038. A massive gun battle followed for at least an hour and a half. App. at 2041, 2230. Meanwhile, the insertion teams had set off several explosions on both sides of the house. App. at 2043-45, 2048-49, 2230. By mid-morning, the fronts of the MOVE house and adjoining houses were damaged heavily. App. at 1616-17, 2230-31. Yet, because they were under heavy gunfire and because the walls of the MOVE house were fortified, the teams could not create usable pathways through which tear gas could be introduced successfully. App. at 959-61, 1878-91, 2043-50, 2230-31. Consequently, the original plan was abandoned and the officers on the insertion teams retreated. As they did so

they heard children's voices coming from the basement of the MOVE house. App. at 2051. Still, MOVE members had not given any indication that they would surrender. App. at 2231.

Around 4:00 p.m. that afternoon, Sambor, Brooks, Richmond, and other city officials and police officers, discussed alternative ways to remove the bunker and to proceed against the MOVE members. App. at 971-75, 2060-61, 2231. They also discussed whether to let the situation stand overnight and continue their efforts to execute the warrants the next morning. App. at 977-80, 998, 1004-05. But they determined that they could not wait until morning because it would be too difficult to keep the neighborhood secure through the night due, among other factors, to the darkness and the exhaustion which likely would set in on the officers who had been on duty since the night before. *Id.* They also believed that MOVE members might escape through tunnels rumored to have been dug under the neighborhood. *Id.*; app. at 1410-11, 1504, 1666-67.

Accordingly, the officials considered other means to execute the warrants but they rejected all as too dangerous. These included plans to use a crane to remove the bunker, to attack from the room, to attack from the front or the back of the house, and to place an explosive in the bunker. App. at 963, 2060-61. The officials then focused on a plan to drop a "satchel charge" onto the bunker from a helicopter to destroy or dislodge the bunker and create a hole in the roof. App. at 1131, 2061-62. The officials discussed the possibility that the explosive could start a fire but they were satisfied that the risk would be negligible. App. at 981, 1011, 1149, 1191, 2061-62. Managing Director Leo Brooks then informed Mayor Goode of the plan to use the explosive, and Mayor Goode

approved it.[3] App. at 983-84, 1070, 2064-65, 2231. At about the same time, a group of neighbors used a bullhorn to plead with the MOVE members to surrender but received no response. App. at 966-68, 1852-54, 2231.

The plan to use the explosive went forward. Att. at 2231. Klein constructed the device and Powell dropped it on the roof of the MOVE house from a helicopter operated by state troopers Richard Reed and Morris Demsko. App. at 2068, 2231. Rather than destroying the bunker, however, the satchel seems to have missed it entirely. App. at 1622-23, 2058.

Goode watched the explosion on television in his City Hall office, Brooks and Sambor observed it from the balcony of a nearby building, and Richmond saw it from Osage Avenue. *Id. at 1156, 2097.* Brooks described his observations as follows:

> I observed an explosion that was from our [vantage point,] a dust ball, in other words a smoke ball.... It blew wood in all directions. Then it was very -- then the smoke rose. It was a very light gray smoke, as the smoke rose away from it, the helicopter was flying above it, and we could see nothing there but a hole in the roof.

App. at 987.

Shortly after the explosion, observers saw a fire on the room. App. at 988. There is evidence that a detonation

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[3] There is a dispute as to whether Mayor Goode knew that the plan was to drop the explosive from a helicopter, but this is not germane to my discussion because he knew and approved of dropping the explosive onto the bunker.

caused the fire by igniting combustible liquid vapor. App. at 2058, 2311. Commissioner Sambor, who now was on Osage Avenue with Commissioner Richmond, then asked Richmond, "if we let the roof burn to get the bunker could we then subsequent to that control the fire?" App. at 1072-73. Sambor testified:

> I wanted to get the bunker. I wanted to be able to somehow have tactical superiority without sacrificing any lives if it were at all possible. And in that vein I asked him -- I'm a police officer. I am not a fire fighter. I asked him for his concurrence, that if we let the roof burn to get the bunker, could we then control the fire. And whatever the response was, it was in the affirmative.

App. at 1073. Richmond's testimony corroborates this:

> I told him essentially that, that I thought we could contain the spread at that point. He said, 'Let's let the bunker burn to eliminate that high ground advantage and the tactical advantage of the bunker,' and I said, 'Okay'... and I concurred.

App. at 1163. Richmond also testified that he had prepared the fire fighters as soon as he knew of the fire. App. at 1157. But because he did not know the positions of the police officers, if any, around the area of the roof he first told an aide, "[g]et a hold of the police and see what they want to do about this fire on the roof." *Id.* Thus, the fire was allowed to burn until Goode and Brooks ordered that it be extinguished.

The fire fighters, however, encountered many problems. For example, there was a live electrical wire in the vicinity, the water itself caused visibility problems, and the water caused the fire to "bank," or invert, downward into the

house. *Id.* at 1158-59, 2117-20. The fire then went out of control killing 11 people and destroying 61 houses. Ramona Africa and a young boy were the only survivors from the house.

II. PROCEDURAL HISTORY

A. The Claims

Numerous suits were filed by property owners from the neighborhood and on behalf of the occupants of 6221 Osage Avenue. The court consolidated these cases for discovery under number 85-2745, to be managed by a magistrate judge.

The defendants' answers raised affirmative defense, including immunity from liability. The individual defendants, sued also in their official capacity as officers or employees of the city (collectively, the city defendants), joined Ramona Africa as an additional defendant. Africa then moved to dismiss this third-party complaint but the court denied her motion. She then joined in this action against the city defendants and the City of Philadelphia, and her case was added to number 85-2745. During the ensuing four and a half years most of the claims were resolved. The remaining claims are *Ramona Africa v. The City of Philadelphia, et al., number 87-2678, Alfonso Leaphart v. The City of Philadelphia, et al., number 87-2756, and Louise James v. The City of Philadelphia, et al., number 85-3528.*

Ramona Africa sued the City of Philadelphia and Mayor Wilson Goode, Managing Director Leo Brooks, Police Commissioner Gregore Sambor, Fire Commissioner William Richmond, District Attorney Edward Rendell, City Police Lieutenant Frank Powell, City Police Officers William Klein and Michael Tursi, City Police Sergeants Albert Revel and Edward Connor, State Police Corporal Morris Demsko, and

State Trooper Richard Reed, in their official capacities and individually. Africa claimed that: (1) the defendants, in violation of 42 U.S.C. §1983, deprived her of her constitutional rights of freedom of religion, expression, and association, of due process, of equal treatment under the law, and of "freedom from excessive force, assault and bodily injury," app. at 102; (2) the defendants, in violation of 42 U.S.C. §1985(3), Conspired to deprive her of these constitutional rights; and (3) the defendants violated state law in using unreasonable force in the arrest in violation of section 1983. Africa seeks compensatory and punitive damages. Her action against Rendell was, however, dismissed on qualified immunity grounds and she does not appeal from that dismissal.

Alfonso Leaphart sued on behalf of John Africa a/k/a Vincent Lopez Leaphart, who perished in the fire. Leaphart initially sued the same defendants as Ramona Africa as well as certain others, but his suit was dismissed as to some of the defendants prior to entry of the orders now on appeal. Currently, the defendants in his case are the City of Philadelphia, Mayor Goode, Commissioner Richmond, Lieutenant Powell, and Officers Klein, Tursi, and Revel. Leaphart alleges that they violated his decedent's rights under the First, Fourth, and Fourteenth Amendments, in violation of 42 U.S.C. §§1983 and 1985(3)[4] He seeks compensatory and punitive damages as well as declaratory relief.

Louise James sued on behalf of her son Frank Africa a/k/a Frank James, who perished in the fire, and on her own behalf as owner of 6221 Osage Avenue. James currently sues

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[4] Leaphart also asserted a claim under the Fifth Amendment but I do not deal separately with the claim inasmuch as the Supreme Court indicated in *Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989),* that excessive force claims should be considered under the Fourth Amendment. I discuss this point later.

the City of Philadelphia, Mayor Goode, Commissioners Sambor and Richmond, Managing Director Brooks, and Lieutenant Powell, for compensatory and punitive and damages. In her personal capacity, she asserts a claim under the Fifth Amendment for the uncompensated destruction of her property. On behalf of her son, she asserts a section 1983 claim and a section 1985(3) claim based on the alleged deprivation of her son's constitutional rights and state law claims. As is evident, some of the claims asserted by all three plaintiffs against certain defendants are identical. Accordingly, I will treat such similar claims together.

B. The District Court Rulings

In a March 26, 1992 report and recommendation, the magistrate judge recommended that the court deny the motions for summary judgment sought on qualified immunity grounds by Mayor Goode, Managing Director Brooks, Commissioner Sambor, Commissioner Richmond, Lieutenant Powell, Officer Klein, and State Police Officers Demsko and Reed. *See Africa v. City of Philadelphia, 809 F.Supp. 375, 376-77 (E.D.Pa. 1992)* (hereinafter Africa I). He also recommended that the court grant summary judgment in all three cases on qualified immunity grounds to Officers Tursi, Revel, and Connor because they were involved only with the attempted penetration of the sides of the house. *Id. at 377 n. 5.* The district court approved and adopted the latter recommendations, and these orders have not been appealed. *Id.*

But the district court remanded the remaining matters to the magistrate judge for consideration under the guidelines the Supreme Court set forth in *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985),* stating as follows:

> [T]he court must determine, on plaintiff's

> well-documented version of the facts, whether a reasonable officer in each defendant's position, to the extent that this defendant could be found to have some responsibility for the use of force in question, could have believed that the force employed was necessary to protect the safety of himself or others.

Africa I, 809 F.Supp. at 382 (citation omitted); In re City of Philadelphia Litig., 849 F.Supp. 331, 337 (E.D.Pa. 1994) (hereinafter Africa II).

On October 6, 1993, the magistrate judge issued another report and recommendation. He analyzed the defendants' actions as involving two separate decisions: the plan to drop the explosive device onto the bunker and the decision to let the fire burn. He concluded as follows:

> [A] reasoble person in each of the defendant's positions could have believed that the use of an explosive device to remove the bunker from the roof and to provide access to the interior of the house for tear gas was necessary to 'prevent death or serious bodily injury' to the police officers on the scene or other persons. In addition, based on the information available to them regarding MOVE's threat of violence and MOVE's use of force in resisting arrest, they could have believed that the use of the bomb would be conduct that was consistent with the principles embodied in Section 508[5] [of the

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[5] The Supreme Court cited the Pennsylvania Crimes Code in *Tennessee v. Garner, 471 U.S. at 17 n. 18, 105 S.Ct at 1704 n. 18,* in developing the Court's constitutional standard. Section 508 states, in relevant part:

> (1) A peace officer, or any person whom he has summoned or

Pennsylvania Crimes Code] and *Garner*.

Africa II, 849 F.Supp. at 337, 357. Section 508 defines the circumstances in which a police officer may use force in making an arrest. Thus, the magistrate judge recommended that all defendants be granted summary judgment in all three cases to the extent that the plaintiffs sought to impose liability based on the dropping of the explosive device.

The magistrate judge concluded, however, that under the standards of *Tennessee v. Garner* and section 508 of the Pennsylvania Crimes Code it was unreasonable to let the fire burn after the bunker had been neutralized. *Id. at 337, 359-61.* He also determined that Commissioners Sambor and Richmond made the decision to let the fire burn but that the other city defendants were not involved at this stage. *Id. at 337, 360.* Therefore, he recommended that the court deny summary judgment on qualified immunity grounds for the two commissioners with respect to claims based on letting the fire

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directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:

(i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.Cons.Stat.Ann § 508(a) (1983).

burn. *Id.* They objected to this recommendation on the ground that the evidence demonstrated that they had intended to let the fire consume only the bunker, which they believed to pose a lingering threat. *Id. at 339.*

The magistrate judge further found that while the defendants may be entitled to statutory immunity from state law liability for acts performed in the scope of their duties, they would not be entitled to immunity of they engaged in "willful misconduct." *Id. at 364.* Accordingly, the magistrate judge recommended that the court grant summary judgment on immunity grounds with respect to the state claims to those individual defendants involved only in the dropping of the explosive device. *Id.* In these instances, the grant of summary judgment on the federal claims demonstrated that the conduct of these defendants did not, as a matter of state law, constitute "willful misconduct." *Id.* Conversely, he recommended that those defendants denied summary judgment on the federal claims also should be denied summary judgment for the state claims. *Id.*

The district court adopted the magistrate judge's recommendation as to the claims based on the dropping of the explosive device. *Id. at 338-39.* In reviewing the recommendation, however, the court "focused on the decision to let the fire burn at all." *Id.* The court stated:

> I cannot conclude that there is a demonstration which leads to the judgment as a matter of law that it was reasonable as a matter of necessity, at the point after the bomb was dropped and when a flame was first visible, for the law enforcement officials to permit flame [sic] to continue until it totally consumed what remained of a bunker.... That it might be *convenient* to have let the balance of the bunker be consumed by fire is perhaps a

> tenable view. That it was necessary, in *Tennessee v. Garner* terms, I can find no basis for concluding.

Id. at 340. Thus, the court concurred with the magistrate judge's view that summary judgment should be denied to Commissioners Sambor and Richmond with respect to claims based on letting the fire burn. *Id. at 342, 347.*

During oral argument the district court raised the question of "whether there was not some basis in the record for concluding that conceivably Managing Director Brooks concurred for a time in the decision to let the fire burn." *Id. at 342.* Although Africa had not objected earlier to the magistrate judge's finding that he had not concurred in that decision, she decided to do so then. *Id.* In a further interview, Commissioner Sambor indicated that when he explained to Brooks that they were letting the fire burn the bunker, Brooks said, "only the bunker." *Id. at 343.* Sambor said further that Brooks subsequently told him to put the fire out. Attorneys for the city and for Brooks argued that the plaintiffs waived this issue and that no other evidence supports the allegation that Brooks was involved in the decision to let the fire burn. The district court rejected these arguments and denied the summary judgment which Brooks sought on qualified immunity grounds with respect to claims based on the decision to let the fire burn. *Id. at 345, 347.*

With regard to claims against the City of Philadelphia, the city first argued that only Mayor Goode and Managing Director Brooks had final decision-making authority and that it should not be held responsible for their subordinates' unapproved decisions. However, upon finding that Brooks could be denied qualified immunity, the city changed its position and argued that only Mayor Goode had final decision-making authority. *Id. at 345.* The court reviewed the city's charter and concluded that the suability of either

Managing Director Brooks or the two commissioners would be sufficient to hold the city suable on the federal claim. *Id. at 345-47.*

The court also held, in accord with the magistrate judge's recommendation, that all defendants were entitled to summary judgment based on lack of evidence with respect to the plaintiffs' claims under the First and Fourteenth Amendments and under section 1985(3). In addition, the court held that the city was entitled to summary judgment on the state law claims because a recent Pennsylvania Supreme Court opinion established that the city council did not have the authority to expand the scope of the Pennsylvania Political Subdivision Tort Claims Act. This Supreme Court ruling was critical as the viability of the plaintiffs' state law claims depended on this expansion.

Finally, the court dismissed James' Fifth Amendment claim because she did not allege that she had pursued relief unsuccessfully under state law procedures such as those set forth by the Pennsylvania eminent domain code. *In re City of Philadelphia (James v. City of Philadelphia), No. 85-3528, slip op. at 11-13, 1994 WL 46654 (E.D.Pa. Feb. 1, 1994).* James pointed out that she had brought a federal suit, number 88-3881, for recovery of her property losses under federal and state law. In that action she alleged that she was the only person whose property had been destroyed by the fire whom the city did not compensate and she asserted that such treatment was discriminatory. *Id.* In December 1988, the court dismissed number 88-3881 with prejudice as to the federal claims on the grounds that they were barred by the statute of limitations and it dismissed the state law claims without prejudice. *Id.* James did not appeal from that ruling. On January 3, 1994, one day before the district court rendered its bench opinion in the case currently before us, James filed a Motion for Reconsideration Nunc Pro Tunc of the 88-3881 decision under both docket numbers, 88-3881 and 85-3528.

The district court denied this motion, reasoning that it had been five years since the 88-3881 case had been decided and James had offered no new evidence or reasons for reexamining that decision. *Id. at 13.*

On motion by the City, the district court certified as final under Fed.R.Civ.P. 54(b) the dismissal of all claims against Goode, Powell, Klein,[6] Revel, Tursi, Connor, Demsko, and Reed. App. at 682, 803. In addition, the court certified for appeal under 28 U.S.C. §1292(b) the issue "of suability of the City of Philadelphia, pursuant to 42 U.S.C. §1083, on claims arising from the decision to let the ... fire burn." *Id.*

C. The Issues on Appeal

Ramona Africa appeals from the district court's final order granting summary judgment in favor of Mayor Goode and Officers Powell and Klein. Alfonso Leaphart appeals from the final judgment granting summary judgment in favor of Mayor Goode. Louise James appeals from the final judgment granting summary judgment in favor of Mayor Goode and Officer Powell[7] and in favor of the City of Philadelphia with respect to the Fifth Amendment property claim. James has appealed only from orders in the 85-3528

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6 Apparently, the district court has not certified as appealable under Rule 54(b) the grant of summary judgment in favor of Officer Klein in the suit brought by Alfonso Leaphart. This point is of no importance because no appeal has been taken from that order.

7 James' notice of appeal also states that she would be appealing the grant of summary judgment in favor of Officer Klein. App. at 823. I believe this is a clerical error because Officer Klein was not a defendant in her action and because she does not mention Officer Klein in her brief.

case.

The City of Philadelphia appeals from the order denying its motion for summary judgment with respect to the federal claims based on section 1983. Managing Director Brooks and Commissioners Sambor and Richmond appeal from the orders denying their motions for summary judgment on qualified immunity grounds with respect to the claims based on the decision to let the fire burn and from the orders denying them summary judgment on the state claims. We consolidated the appeals for briefing and argument.[8]

III. JURISDICTION

The district court had jurisdiction over the federal civil rights claims pursuant to 28 U.S.C. §1343 (civil rights action) and 28 U.S.C. §1331 (federal question jurisdiction). The district court also had supplemental jurisdiction based upon 28 U.S.C. §1367 over the related state law claims.

A. Judgments Certified Under Rule 54(b)

We have jurisdiction pursuant to 28 U.S.C. §1291 over the appeals from the grants of summary judgment which the district court certified as final judgments under Rule 54(b). *Gerardi v. Pelullo, 16 F.3d 1363, 1368-69 (3d Cir. 1994).* These final judgments include grants of summary judgment on qualified immunity grounds with respect to all claims against

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[8] The plaintiffs have not attempted to appeal from the district court's order granting summary judgment in favor of the city on the state claims. Nor have any of the plaintiffs challenged on appeal the grant of summary judgment, on grounds of insufficient evidence, for all defendants as to claims based on alleged violations of First and Fourteenth Amendment rights of the MOVE members.

Goode, Powell, Klein,[9] Tursi, Revel, Connor, Demsko, and Reed. As they are properly before us, I shall review Africa's appeal from the summary judgments in favor of Goode, Powell, and Klein; Leaphart's appeal from the summary judgment in favor of Goode; and James' appeal from the summary judgment in favor of Goode and Powell.

B. Denial of Summary Judgment Certified Under 28 U.S.C. §1292(b)

In orders dated January 31, 1994, and February 1, 1994, the district court stated as follows:

> It is DECLARED to be the opinion of this court that, within the intendment of 28 U.S.C. §1292(b), (1) the issue, determined adversely to the City of Philadelphia....., of the suability of the City of Philadelphia, pursuant to 42 U.S.C. §1983, on claims arising from the decision to let the [MOVE] fire burn, is one which involves a controlling question of law as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal from that aspect of the... order, taken in conjunction with anticipated appeals on related question of qualified immunity of certain individual defendants, may materially advance the ultimate termination of the litigation.

App. at 682-802-03. This court then granted the city leave to

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9 As I have noted above, the district court certified as appealable under Rule 54(b) its grant of summary judgment as to Ramona Africa's claims against Officer Klein, but not as to Alfonso Leaphart's claims. This decision, however, has not been appealed.

appeal and thus we have jurisdiction over the city's appeal.

C. Denial of Summary Judgment on Qualified Immunity Grounds with Respect to Federal Claims

[1] Generally, this court does not have jurisdiction to review the denial of summary judgment because such decisions are not final as required by 28 U.S.C. § 1291. *Giuffre v. Bissell, 31 F.3d 1241, 1245 (3d Cir. 1994).* In *Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985),* however, the Supreme Court held that a denial of summary judgment on the ground of qualified immunity is appealable under the collateral order doctrine. "[A] decision of a district court is appealable if it falls within 'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id. at 524-25, 105 S.Ct. at 2814 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)).*

The Court found that qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation" which would be "effectively lost if a case is erroneously permitted to go to trial." *Id., 472 U.S. at 526, 105 S.Ct. at 2815.* Moreover, a district court's denial of qualified immunity would be "effectively unreviewable on appeal from a final judgment." *Id. at 527, 105 S.Ct. at 2816.* The Court also found that this denial "conclusively determined the disputed question" of a defendant's right not to stand trial on the plaintiff's allegations, as required under *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978).* Finally, the Court determined that "a claim of immunity is conceptually distinct from the

merits of the plaintiff's claim that his rights have been violated," thus satisfying the requirement of being "collateral" under *Cohen. Mitchell v. Forsyth, 472 U.S. at 527-28, 105 S.Ct. at 2816.*

[2] Therefore, we all agree that we have jurisdiction to consider the appeals taken by Brooks, Sambor, and Richmond from the district court's denial of summary judgment on qualified immunity grounds with respect to federal claims based on letting the fire burn. *See Giuffre v. Bissell, 31 F.3d at 1245; Hunson v. City of Chester Legal Dept., 864 F.2d 1026, 1028-29 (3d Cir. 1988).*

D. Denial of summary Judgment on Immunity Grounds with Respect State Law Claims

[3] I now address the question of whether we have jurisdiction over the appeals from the district court's denial of summary judgment for Brooks, Sambor, and Richmond on the state law claims based on letting the fire burn. I conclude that we do not have such jurisdiction and, as Judge Lewis agrees, he joins in the determination dismissing this aspect of the appeals. The district court did not certify this order under either Rule 54(b) or section 1292(b).[10] Nor, I think, is this issue so intertwined with those raised by the appeals properly before us that we should assert pendent appellate jurisdiction over it. *See National Union Fire Ins. Co. v. City Savings, F.S.B., 28 F.3d 376, 382 n. 4 (3d Cir. 1994); Kershner v. Mazurkiewicz, 670 F.2d 440, 449 (3d Cir. 1982).*

I therefore consider whether we may assert jurisdiction over these appeals under the collateral order

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10 I am not suggesting that the court could have certified the denial of summary judgment under Rule 54(b).

doctrine. In this inquiry *Brown v. Grabowski, 922 F.2d 10987,* is instructive. In that case, the district court denied qualified immunity to the defendant police officers on plaintiff's pendent tort claims under New Jersey law. On appeal, this court noted that the determination of appellate jurisdiction over the state claims requires "(1) a predicate inquiry into whether the federal law of qualified official immunity ultimately governs appealability in this instance; and (2) a subsequent inquiry into the nature of the qualified immunity that New Jersey law confers upon state officials." *Id. at 1106.*

In *Brown* this court concurred with the Courts of Appeals for the Fifth and Sixth Circuits that "the parties... in a federal action such as this one involving pendent state claims, are bound by federal procedural rules governing appeals, including the collateral order doctrine." *Id. (citing Sorey v. Kellett, 849 F.2d 960, 962 (5th Cir. 198); Marrical v. Detroit News, Inc., 805 F.2d 169, 172 (6th Cir. 1986)).* However, it is state law that provides the substantive doctrine of immunity. The court also concluded that "the denial of a claim of qualified immunity premised upon state law is appealable only if the state has conferred an underlying substantive immunity from suits arising from the performance of official duties." *Id. at 1106-07 (citing Marrical, 805 F.2d at 172; Sorey, 849 F.2d at 962).* It is immunity from suits, rather than mere immunity from liability, that would make such an order appealable. *Giuffre v. BIssell, 31 F.3d at 1248.*

In *Brown v. Grabowski* this court looked at the New Jersey Tort Claims Act, New Jersey case law on immunity, and New Jersey's doctrinal and procedural rules concerning interlocutory appeals to determine the scope of the state immunity. *922 F.2d at 1107.* Thus, here I look to the Pennsylvania law of official immunity to ascertain whether we have jurisdiction over the three officials' appeals from the denial of summary judgment on the state law claims arising

from the decision to allow the fire to burn.

In this case, the district court did not elaborate on the state law claims but seemed to adopt the magistrate judge's approach. The magistrate judge stated that although Pennsylvania's Political Subdivision Tort Claims Act (PSTCA) grants immunity to the city's employees to the same extent that the city is immune, such immunity would not apply if "it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct." *Africa II, 849 F.Supp. at 364 (citing 42 Pa. Cons.Stat.Ann. §§8545 & 8550 (1982))*. Thus, the magistrate judge recommended that those defendants who were to be granted summary judgment on claims based on dropping the explosive device and letting the fire burn should be entitled also to assert immunity under the PSTCA because "they have demonstrated, as a matter of law, that their conduct did not constitute a crime, actual fraud, actual malice or willful misconduct." *Id.* As to those defendants whose motions for summary judgment were to be denied as to claims based on letting the fire burn, however, the magistrate judge recommended that they be denied summary judgment on the state claims as well. This is because "they cannot show as a matter of law that their decision did not constitute willful misconduct." *Id.*

Although I do not find guidance on the point in the opinions of the Pennsylvania Supreme Court, the Commonwealth Court of Pennsylvania has ruled that an order denying a summary judgment sought on statutory immunity grounds is not appealable immediately. *Bollinger v. Obrecht, 122 Pa.Cmwlth. 562, 552 A.2d 359 (1989), appeal denied, 527 Pa. 588, 589, 588 A.2d 511 (1990).* This ruling strongly implies that such immunity is only from liability, despite the fact that the court went on to say it need not reach the issue of whether Pennsylvania law confers immunity from suit rather than from liability. *Id. at 363 & n. 5.* The Commonwealth

Court noted that Pennsylvania courts have followed *Cohen's* collateral order doctrine but ruled that *Mitchell v. Forsyth* was not controlling because it involved only federal immunity. *Id., 552 A.2d at 362-63. Id. at 363 & n. 5.* The court explained.

> In Pennsylvania, immunity is governed by statute. The merits of a plaintiff's cause of action against government agencies and officers are likewise governed by the same statute. Thus, a trial court analyzing an immunity claim is actually deciding the same issues that will arise in the underlying action. Unlike matters of federal official immunity, the trial court's interlocutory order denying an immunity claim under Pennsylvania law, is not separate from and collateral to the main cause of action.

Id. at 363. But as *Mitchell* noted, when immunity from suit is involved, the opposite result should be reached.

Later cases consistently have followed *Bollinger v. Obrecht. See, e.g., Farber v. Pennsbury Sch. Dist., 131 Pa.Cmwlth. 642, 571 A.2d 546 (1990)* (quashing appeal as interlocutory from denial of motion for summary judgment on grounds of governmental immunity); *Brown v. Philadelphia, 126 Pa. Cmwlth. 549, 560 A.2d 309 (1989)* (same), *aff'd, 524 Pa. 101, 569 A.2d 351 (1990); Gwiszcz v. Philadelphia, 121 Pa.Cmwlth. 376, 550 A.2d 880 (1988)* (same). Indeed, the language of the PSTCA supports the Commonwealth Court's reasoning as the act seems to be directed at liability, referring to immunity as only a defense to such liability rather

than as a right to be free from suits.[11]

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[11] **§8545. Official liability generally**

An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

§8546. Defense of official immunity

In any action brought against an employee of a local agency for damages on account of an injury to a person or property based upon claims arising from, or reasonably related to, the office or the performance of the duties of the employee, the employee may assert on his own behalf, or the local agency may assert on his behalf:

(1) Defenses which are available at common law to the employee.

(2) The defense that the conduct of the employee which gave rise to the claim was authorized or required by law, or that he in good faith reasonably believed the conduct was authorized or required by law.

(3) The defense that the act of the employee which gave rise to the claim was within the policy making discretion granted to the employee by law. For purposes of this subsection, all acts of members of the governing body of a local agency or of the chief executive officer thereof are deemed to be within the policy making discretion granted to such person by law.

§8550. Willful misconduct

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa.Cons.Stat.Ann. §§8545, 8546 & 8550 (1982).

The fact that interlocutory orders may be appealable by permission of the appellate court, under the Pennsylvania Rules of Appellate Procedure, is irrelevant to my inquiry. *See Wareham v. Jeffes, 129 Pa.Cmwlth. 124, 564 A.2d 1314, 1318 n. 8 (1989)* (noting that denial of summary judgment on grounds of sovereign immunity would be interlocutory and unappealable except by permission). *See also Lancie v. Giles, 132 Pa.Cmwlth. 255, 572 A.2d 827, 829 n. 3 (1990)* (Commonwealth Court granted defendants permission to appeal from interlocutory order denying summary judgment on state statutory immunity grounds).[12] First, whereas Pennsylvania appellate courts may grant permission to appeal from interlocutory and otherwise unappealable orders, absent a certification by the district court under 28 U.S.C. §1292(b), we cannot do so. In fact, the exercise of discretion to withhold such permission effectively will negate a claim of immunity from suit. Second, as we stated in *Brown v. Grabowski,* federal rules govern this federal action. 922 F.2d at 1107 (quoting *Marrical, 805 F.2d at 172). Bollinger* demonstrates that Pennsylvania has not done that. Thus, because immunity is not a separate or collateral issue from the underlying claim under Pennsylvania law, we have no jurisdiction over the appeals by Brooks, Sambor, and Richmond from the district court's order denying them summary judgment on the state law claims. We therefore will

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12 Because that case involved both federal qualified immunity and state statutory immunity, the court also noted in dictum that given *Bollinger's* holding, "[w]here the motion is partially based on qualified immunity, the issue becomes more difficult in light of the U.S. Supreme Court's emphasis on the appealability of denials of summary judgment as a necessary part of fulfilling the purpose of qualified immunity." *Lancie v. Giles, 572 A.2d at 829 n. 3 (citing Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806).*

dismiss their appeals from the district court's orders denying summary judgment as to the state law claims.

E. Grant of Summary Judgment with Respect to James' Property Claims in Favor of the City

[4] James appeals from the district court's grant of partial summary judgment in favor of the City of Philadelphia with respect to her claim based on the uncompensated destruction of property. James argues that in refusing to compensate her on the same basis as her neighbors, the city discriminated against her and has been enriched unjustly at her expense. We all agree, however, that James has not set forth any jurisdictional basis which permits us to consider her property arguments as there are claims remaining in the district court and thus her appeal is not from a final judgment.

As I indicated above, James brought a separate federal civil rights suit, number 88-3881, seeking damages for her property, the thrust of which was that her treatment, "as allegedly the only person in the neighborhood of destroyed houses or damaged houses who was not offered to be compensated..., was discriminatory in terms that were unconstitutional." App. at 815. The court dismissed these federal claims with prejudice because they were barred by the statute of limitations and it dismissed the state claims without prejudice. James did not appeal from this judgment.

In the case now before us, number 85-3528, the magistrate judge recommended that the court grant partial summary judgment as to the property issue in favor of the city because the takings claim could not stand "without an appropriate allegation of unsuccessful resort to state procedures pursuant to Pennsylvania's eminent domain code." *Id.* James, however, asked the district court either to disregard the recommendation or to reopen the 1988 case,

nunc pro tunc, because she believed the court had decided it erroneously. *Id.* The district court agreed with the magistrate judge's recommendation and declined to reopen the 1988 case.

James' present appeal is from the decision rendered in number 85-3528 as her notice of appeal makes no mention of number 88-3881. Consequently, she cannot contest directly the court's refusal to reconsider the 1988 case. Nevertheless, what James argues now is strongly reminiscent of her allegations in the 1988 suit -- that the denial of compensation for her property is discriminatory and violates her equal protection and First Amendment rights and that the city has been enriched unjustly. James devotes a large part of her appellate effort to the allegations that she has been denied equal protection and has been the victim of unlawful discrimination. She asserts repeatedly that she is "a member of the class of individuals, such class consisting of the victims of the Osage Avenue fire." *James Br. at 37, 38.* She directs this argument to the magistrate judge's conclusion that she neither has alleged nor shown that the city's action was "based on any class-based invidiously discriminatory animus." *See* app. at 792-93.[13] However, the magistrate judge made this statement in explaining why the claims under section 1985(3) on behalf of James' deceased son must fail. Thus, his comments were not addressed to her property claim in case 85-3528. These misdirected arguments by James support the city's suggestion that she is attempting to incorporate the number 88-3881 case into the present one. To the extent that James is attempting now to appeal from that December 1988 dismissal, we must reject the attempt for lack of jurisdiction. *See United States v. Rivera Const. Co., 863 F.2d 293, 298-99 (3d Cir. 1988)* ("where the order or judgment upon which

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13 Actually it is difficult to see how there can be merit to this claim as all the other homeowners received compensation.

the appellant seeks review is neither directly nor indirectly referred to in the notice of appeal, then the issue is not fairly raised and the Court of Appeals does not acquire jurisdiction").

Furthermore, we see no basis to exercise jurisdiction over James' appeal from the judgment in favor of the city in number 85-3528 on the uncompensated destruction of property claims. The collateral order doctrine has nothing to do with the claim and the district court did not enter a certification with respect to the order under either Rule 54(b) or 28 U.S.C. §1292(b).

F. Scope of Appellate Review

We exercise plenary review over all appeals properly before us because they are all from grants or denials of summary judgment. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 554, 126 L.Ed.2d 455 (1993)* (grant of summary judgment); *Giuffre v. Bissell, 31 F.3d at 1251* (denial of summary judgment on qualified immunity grounds); *Acierno v. Cloutier, 40 F.3d 597, 609 (3d Cir. 1994)* (in banc) (same). Moreover, we have plenary review over the grant or denial of qualified immunity because it is an issue of law. *Giuffre v. Bissell, 31 F.3d at 1254.* Thus, I will consider whether there are genuine issues as to material facts and whether the defendants are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

IV. QUALIFIED IMMUNITY

[5] Courts determine whether a defendant is entitled to qualified immunity by balancing the important policy of compensating individuals for deprivation of their rights against "the need to protect officials who are required to exercise their discretion and the related public interest in

encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982)* (quoting *Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978)*). In making this balance, courts recognize that officials often must "act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer v. Rhodes, 416 U.S. 232, 246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974).* Thus, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. at 818, 102 S.Ct. at 2738.*

[6] *Siegert v. Gilley, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991),* instructs that before a court addresses a claim of qualified immunity, it first should determine whether a plaintiff has alleged "a violation of constitutional right at all." *See Acierno v. Cloutier, 40 F.3d at 606 n. 7: D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1368 (3d Cir. 1992)* (in banc), *cert. denied,* ____ U.S. ____, *113 S.Ct. 1045, 122 L.Ed.2d 354 (1993).* Deciding "this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley, 500 U.S. at 232, 111 S.Ct. at 1793.*

[7] Furthermore, for there to be liability, the right alleged to have been violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).* While the abstract right to be free from unreasonable seizure clearly is

established, for qualified immunity purposes the right must be considered on a more specific level: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

[8] Consequently, I consider whether the particularized constitutional right asserted was "'clearly established' at the time the defendants acted." *Svirtno v. Vlouyirt, 40 G.3f sy 606 (citing Siegert v. Gilley, 500 U.S. at 232, 111 S.Ct. at 1793); Harlow v. Fitzgerald, 457 U.S. at 817-19, 102 S.Ct. at 2738.* If the law is not established clearly when an official acts, he is entitled to qualified immunity because he "could not reasonably be expected to anticipate subsequent legal developments, nor could be fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* On the other hand, if the law was established clearly, the official still may obtain qualified immunity if he claims "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* In other words, "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."[14] *Malley v. Briggs, 475 U.S. 335, 341, 106*

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[14] Some of the decisions of this court may have rephrased this test in that they may be read to place a heavier burden on the official seeking immunity than is warranted by the Supreme Court's formulation of the issue. In *Good v. Dauphin County Social Serv.*, this court accurately described the test as whether "reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful." *891 F.2d at 1092* (emphasis added). This court later misquoted *Good*, however, to say that "qualified immunity does not apply if 'reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be unlawful.'" *Abdul-Akbar v. Watson, 4 F.3d 195, 202 (3d Cir.*

S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

A. Allegation of a Constitutional Violation

In *Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989),* the Court held "that all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigation stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Thus, the general right central to this case is the right to be free from unreasonable seizure of the person under the Fourth Amendment, in particular seizure with unreasonable force.

Siegert v. Gilley, however, demands more than conclusory allegations that defendants violated a certain constitutional right. For example, *Siegert* asserted that his rights under the Due Process Clause of the Fifth Amendment were violated when Gilley maliciously made unkind comments regarding his abilities to a prospective employer. *Siegert v. Gilley, 500 U.S. at 232, 111 S.Ct. at 1793.*

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would be unlawful.'" *Abdul-Akbar v. Watson, 4 F.3d 195, 202 (3d Cir. 1993)* (emphasis added); *Acierno v. Cloutier, 40 F.3d at 616* (quoting *Abdul-Akbar v. Watson*). My point is that reasonable officials could believe that a certain course of conduct is unlawful and they also might believe it is lawful. Thus, though unintended, these cases could support a rule that would deny immunity even when "officers of reasonable competence could disagree on this issue," so long as a reasonable officer could believe that the conduct would be unlawful. *See Malley v. Briggs, 475 U.S. at 341, 106 S.Ct. at 1096.* This reading would place a greater burden on the officials to demonstrate that they have qualified immunity than is warranted. Of course, to the extent that such reading conflicts with Supreme Court precedents, it cannot be followed. *Good* properly states the law.

Because defamation is not a constitutional deprivation, the Supreme Court concluded that Siegert failed not only to allege a violation of a clearly established constitutional right but failed to allege a "violation of any constitutional right at all." *Id. at 233-34, 111 S.Ct. at 1794.* Similarly, in *D.R.* by *L.R. v. Middle Bucks Area Vocational Technical Sch.,* two public school students sued because some of their classmates allegedly molested them. *972 F.2d at 1364.* This court accepted the plaintiffs' statement that they had a "liberty interest in their personal bodily integrity protected by the Fourteenth Amendment," but held that the school's alleged conduct did not amount to a constitutional violation. *972 F.2d at 1368.*

[9] In essence, here the plaintiffs allege that the defendants exerted excessive force in attempting to arrest plaintiff Africa and decedents Leaphart and James, by dropping the explosive on the roof on the MOVE residence and by letting the fire burn. On the face of the complaint, I believe plaintiffs have met the threshold required by *Siegert v. Gilley* by alleging a constitutional violation. Judges Scirica and Lewis agree with this conclusion.

B. Violation of a Constitutional Right

I now consider on the undisputed facts, *Melo v. Hafer, 13 F.3d at 745; Good v. Dauphin County Social Serv., 891 F.2d at 1094-95,* whether the individual defendants are entitled to qualified immunity. In this section, "B. Violation of a Constitutional Right," I write only for myself. First, I ask whether plaintiff Africa and decedents Leaphart and James possessed a "clearly established" constitutional right to be free from the forces allegedly exerted by the individual defendants under the circumstances that existed on May 13, 1985. As the defendants point out, they did not direct force at the person of any of the prospective arrestees. Rather, they directed the force at destruction of

property so that police officers could inject tear gas into the house to effect a peaceful arrest -- one in which neither police officers nor MOVE members would be injured seriously. There is no evidence on the substantially developed record that anyone intended otherwise. In fact, there is evidence indicating that the defendants were concerned with not harming the people inside the house.

The district court, however, refused to consider the officials' argument that they intended only to destroy the bunker. *See Africa II, 849 F.Supp. at 341-42.* The court stated that *Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865,* requires use of an "objective legal reasonableness" test in a Fourth Amendment excessive force case. While this formulation is accurate, I disagree with its application by the district court. In *Graham v. Connor,* the plaintiff allegedly sustained physical injuries when police officers grabbed and cuffed him, threw him on his companion's car, and threw him head first into the police car. *Id. at 389-90, 109 S.Ct. at 1868.* Thus, as is usually true in excessive force cases, the police officers' intent to apply force to the person of Graham was clear. The Supreme Court held that the court of appeals erred when it considered whether the officers "acted in good faith or maliciously and sadistically for the very purpose of causing harm," as the case should have been analyzed under a Fourth Amendment "objective reasonableness" standard. *Id. at 395-97, 109 S.Ct. at 1871-72* (internal quotation marks omitted). Therefore, although the Supreme Court did find the "underlying intent or motivation" irrelevant, this reference was to the officers' motivations for carrying out the direct application of the force to the arrestee's person. *Graham v. Connor, 490 U.S. at 397, 109 S.Ct. at 1872.* But here the issue before us concerns the more fundamental question of whether the officers applied force to the MOVE members at all.

On this point, another Supreme Court decision,

Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), is instructive. In that case, the plaintiffs brought a section 1983 action alleging that the police effected an unreasonable seizure of the decedent by putting up a roadblock into which the decedent fatally crashed the stolen car he was driving. *Id. at 594, 109 S.Ct. at 1380.* The Supreme Court explained:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement..., nor even whenever there is a governmentally caused and governmentally *desired* termination of movement..., but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97, 109 S.Ct. at 1381. In that case, the Court held that there was a Fourth Amendment *Seizure* because the decedent was stopped by the blockade, "the very instrumentality set in motion or put in place in order to achieve that result." *Id. at 599, 109 S.Ct. at 1382.*

But this case is different, as the officials did not intend to apply any force to the persons of the MOVE members when they dropped the explosive device and allowed the fire to burn. Thus, while their subjective thoughts as to the lawfulness of their conduct is irrelevant under *Anderson v. Creighton, 483 U.S. at 641, 107 S.Ct. at 3040,* what is not irrelevant is the officials' intention only to destroy the bunker and perhaps part of the roof so that they could inject tear gas into the house.

In my analysis, I ask whether it is enough for a Fourth Amendment seizure that the MOVE members were stopped by "the very instrumentality set in motion to put in place [the

destruction of the bunker] in order to achieve that result." *Brower v. County of Inyo, 489 U.S. at 599, 109 S.Ct. at 1382.* The Supreme Court cautioned that "[i]n determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line." *Id. at 598, 109 S.Ct. at 1382.* In this sense, a court *must* look to the officials' intent of why they wanted to destroy the bunker and to create a hole in the roof to see whether the destruction of the bunker was set in motion "in order to achieve' the seizure.[15] The destruction of the bunker was obviously a part of the officials' day-long effort to seize the MOVE members, but none of the officials intended it in itself to effectuate the seizure. Nor could they reasonably have intended the destruction f the bunker alone to be conclusive in any way, even though it may well have been reasonable to believe, as they did believe, that its destruction was an important objective.

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15 I also point out that the defendants' contention that they intended the fire to be localized would not necessarily be conclusive on the issue of what their intent really was. Thus, a court could find in a case in which a massive force was used to achieve a limited result that the officials' intent was to effectuate a seizure with the use of the force. In this case, however, there is no basis to conclude that the defendants' intent in dropping the explosive or allowing the fire to burn was other than to permit the introduction of the tear gas.

Nor is this a case in which the police action was "likely to cause injury to the occupants" of the residence. *Carroll v. Borough of State College, 854 F.Supp. 1184, 1190 (M.D.Pa. 1994), aff'd 47 F.3d 1160 (3d Cir. 1995)* (table); *see Opinion at 950-51* (officials reasonable believed risk of fire was negligible and fire, once started, could be contained); at 967-968 (officials had no reason to know that fire could lead to serious injury). Therefore, we are not presented with a situation where the defendants' subjective intent is at odds with the objective likelihood that injury would result from their actions. I need not decide how I would consider the case if we were presented with such facts.

Thus, this case differs from *Brower* because there the police set up the blockade to stop a motoring felon. Consequently, in *Brower*, the decedent "was meant to be stopped by the physical obstacle of the road-block -- and... he was so stopped." *Id. at 599, 109 S.Ct. at 1382.* But in this case, it cannot be said that the defendants intended to seize the MOVE members by destroying the bunker. Nor were they so seized. From the allegations and the evidence n record, we only can say that those who were alive immediately before 5:30 that afternoon were seized, i.e. killed, not by the explosive, nor by the burning of the bunker, but by the fire that continued despite efforts of the fire department. *See Carroll v. Borough of State College, 854 F.Supp. 1184, 1190 (M.D.Pa. 1994)* (holding that to constitute seizure, police action must be "direct:" cause of injury), *aff'd, 47 F.3d 1160 (3d Cir. 1995)* (table).

Accordingly, this is a case of a "governmentally caused and [perhaps] governmentally desired termination of an individual's freedom of movement," but not "through means intentionally applied." *See 489 U.S. at 597, 109 S.Ct. at 1381* (emphasis omitted). Consequently, there was no Fourth Amendment seizure in this case. Thus, on this ground alone I am constrained to vote to reverse the district court's denial of qualified immunity to Brooks, Sambor, and Richmond, and to affirm the district court insofar as it granted the other defendants qualified immunity. In my view what it gets down to, after years of litigation, is uncomplicated: the plaintiffs have o federal case against any defendant by reason of any injury Ramona Africa may have suffered or by reason of the deaths of John and Frank Africa because there was no seizure. The determinative legal issue is as simple as that.

In reaching this result I take note of *Fagan v. City of Vineland, 22 F.3d 1296, 1305 n. 5 (3d Cir. 1994) (in banc),* in which we considered a police pursuit case under the due process clause of the Fourteenth Amendment, and held that if

there is not a seizure a substantive due process "shocks the conscience" claim may be asserted against the police. *See also Carroll v. Borough of State College, 854 F.Supp. at 1192 n. 8.* In this case, however, I do not consider whether we could undertake a due process clause analysis as the plaintiffs present their cases as involving excessive force under the Fourth Amendment rather than as implicating substantive due process principles. Indeed, in her reply brief, Ramona Africa expressly contested the argument some of the defendants advanced that we should apply the "shocks the conscience" test we adopted in *Fagan.*[16]

Nevertheless, *Fagan* is significant here for a different reason. *Fagan* involved a high speed chase resulting in death and injuries both to innocent third parties and to persons in the vehicle the police were pursuing when the pursued vehicle hit a truck. Thus, there can be no doubt that there was in *Fagan,* in the words of *Brower v. County of Inyo, 489 U.S. at 596-97, 109 S.Ct. at 1381,* a government caused and desired termination of an individual's freedom of movement. Yet not a single member of our sharply divided in banc court in *Fagan* suggested that the proper analysis in that case should have centered on the Fourth Amendment protection against unreasonable seizures. Rather, we divided on whether to recover under the substantive due process clause, the plaintiffs had to present proofs satisfying the "shocks the conscience" standard or whether "reckless indifference" was sufficient. In so defining the issue we were undoubtedly correct because *Fagan* did not involve, in the words of *Brower,* "a governmental termination of freedom of movement *through means intentionally applied." Id.* That *Fagan* did not involve such a termination is obvious as the police did not intend that

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16 In any event, in view of my conclusions, with respect to the reasonableness of the defendants' activities, it is evident that I would conclude that the city defendants did not engage in conduct which "shocks the conscience."

the fleeing driver stop his vehicle by colliding with another vehicle. Thus, *Fagan* differed from *Brower* because in *Brower* the police set up the blockade to stop the decedent and it did so. The difference between the cases was so clear that in *Fagan* we did not even discuss *Brower*.

I point out the foregoing because if, as is the case, this court unanimously treated the situation in *Fagan* as not involving a seizure even though the collision was a direct product of the chase, then how could this case possibly involve a seizure? The answer is manifest: there was no seizure here. The city defendants no more intended to burn down the building than the *Fagan* defendants intended to cause a crash. If we were to hold otherwise we would have to conclude that every member of this court undertook an incomplete analysis in *Fagan*. While I recognize that the significance of *Fagan* is somewhat diminished by the circumstance that on appeal the plaintiffs there asserted only due process constitutional contentions, nevertheless we as a panel should give the greatest respect to our recent unanimous in banc analysis in *Fagan*.[17]

C. Excessive Force

[10] I will now assume that there was a Fourth Amendment seizure. I nevertheless conclude that the city defendants are entitled to qualified immunity as their acts were reasonable as a matter of law. Judge Scirica joins in this section, "C. Excessive Force," but only for the limited

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17 In fact, the district court in *Fagan* explicitly held that "[n]o seizure occurred in this case," *Fagan v. City of Vineland, 804 F.Supp. 591, 598 n. 6 (D.N.J. 1992)*, and the plaintiffs did not appeal from the finding, which, after Brower, clearly was correct. *See also Campbell v. White, 916 F.2d 421, 423 (7th Cir. 1990) cert denied, 499 U.S. 922, 111 S.Ct. 1314, 113 L.Ed.2d 248 (1991); Frye v. Town of Akron, 759 F.Supp. 1320, 1323 (N.D.Ind. 1991).*

purpose of agreeing that *Tennessee v. Garner* is inapplicable and that the appropriate inquiry is the reasonableness of the city defendants' acts. He thus disagrees with my conclusion that the city defendants are not liable for a Fourth Amendment violation on the basis of their acts being reasonable as a matter of law. Nevertheless, I conclude that there was no Fourth Amendment violation and under *Siegert v. Gilley, 500 U.S. at 231, 111 S.Ct. at 1793,* the defendants are entitled to summary judgment on the federal claims.

As indicated, the magistrate judge concluded and the district court agreed, that "a reasonable person in each of the defendant's positions could have believed that the use of an explosive device... was necessary to 'prevent death or serious bodily injury' to the police officers on the scene or other person." *Africa II, 849 F.Supp. at 337, 357 (citing Tennessee v. Garner).* With regard to the fire, the magistrate judge did not address explicitly the reasonableness of the decision to let the fire consume the bunker but found that "after the fire had destroyed the rooftop bunker, there remained [no] reasonable basis for the police to believe that allowing the fire to burn was necessary to quell some perceived imminent peril." *Africa II, 849 F.Supp. at 359.* The defendants point out, however, that the record includes no evidence that the officials allowed the fire to burn after it had consumed the bunker. The district court held that letting the fire burn at all, regardless of whether it was intended only to destroy the bunker, as a matter of law, was not "reasonable as a matter of necessity." *Africa II, 849 F.Supp. at 340.* The court drew this conclusion from the facts that apparently no MOVE member had been using the bunker offensively after the police dropped the explosive, that Brooks saw no sign of life on the roof except a dog, and that the bunker, "under Managing Director Brooks' perception, [was] substantially

neutralized on the impact of the bomb." *Id.*[18] Thus, the court stated, "[t]hat it might be *convenient* to have let the balance of the bunker be consumed by fire is perhaps a tenable view. That it was *necessary*, in *Tennessee v. Garner* terms, I can find no basis for concluding. *Id.*

The district court erred in applying *Tennessee v. Garner* to require that the use of force be necessary in this case. Just as an application of "deadly force" may not result in death, the fact that a seizure results in death does not necessarily mean that "deadly force" has been applied. *See, e.g., Robinette v. Barnes, 854 F.2d 909, 912-13 (6th Cir. 1988)* (holding that "deadly force" was not used when police dog attack resulted in death of suspected felon); *Ryder v. City of Topeka, 814 F.2d 1412, 1416-17 & n. 11 (10th Cir. 1987)* (noting that gunshot which did not kill suspect constitutes "deadly force"). For example, the Model Penal Code defines "deadly force" as "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm." Model Penal Code *§3.11(2) (1994); see also Matthews v. Jones, 35 F.3d 1046, 1050-51 (6th Cir. 1994)* (applying Model Penal Code definition to find police dog attack not application of deadly force); *Robinette v. Barnes, 854 F.2d at 912-13* (same). In dropping the explosive on the roof and letting the fire

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18 In his opinion Judge Lewis indicates that the "intention of the defendant officials in dropping the explosive device [and] to blast the bunker from atop the roof... must be considered in light of the fact that the defendant officials had no way of knowing whether the bunker was occupied at the time the explosive device was deployed." *At 976-977.* This statement is wrong for, as the district court explained, nothing in the record demonstrates that the bunker had bee used at all for a substantial time before the dropping of the bomb. *Africa II, 849 F.Supp. at 340.* Obviously the defendants who had the premises under constant observation thought that the bunker was empty when Powell dropped the device and that was the fact.

consume the bunker, the city defendants did not act with the "purpose of causing ... death or serious bodily harm" to the MOVE members in the house but only with the purpose of destroying the bunker. Nor did they have reason to "know" that such actions would "create a substantial risk of causing death or serious bodily harm." Therefore, the district court simply should have asked whether, in light of all the surrounding circumstances, the use of such force was reasonable.[19]

In *Brower v. County of Inyo,* the Supreme Court stated that to have a claim under section 1983, plaintiffs must allege that the seizure was *unreasonable,* which they did in that case by alleging that the roadblock was set in a way likely to kill the decedent. *Id., 489 U.S. at 599, 109 S.Ct. at 1382-83.* In instructing on how a court should consider the reasonableness of the seizure, the Court said:

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19 Judge Lewis concludes that the individual defendants used deadly force and that therefore *Tennessee v. Garner* applies. But in reaching his conclusion that the individual defendants had reason to know that their actions created a substantial risk of causing death or serious bodily harm, Judge Lewis relies more on his intuitive sense of what the police and firefighters "must" have known than on an analysis of what the record evidence shows in this case. *See Judge Lewis' dissent at 976.* ("[t]he force embodied in the incendiary device and in the fire was, *by any sensible standard,* 'deadly' force"); *Dissent at 976* ('To me, this constitutes deadly force, for I *cannot imagine how anyone can conclude that a device such as this was not capable of taking human life* -- which, in fact, it ultimately did."); *Dissent at 977* ("I believe the city defendants, who were professional law enforcement and firefighting personnel, had *every* reason to know that their actions created a substantial risk of death or serious bodily injury to the MOVE members....") Notwithstanding Judge Lewis' intuitions, the record in this case, as detailed in the text, indicates that quite the opposite is true: The police and firefighters had every reason to believe that their actions did not create a substantial risk of death or serious bodily injury.

> This should be contrasted with the situation that would obtain if the sole claim of unreasonableness were that there was no probable cause for the stop. In that case, if [decedent] had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it, then, because of lack of proximate causality, respondents, though responsible for depriving him of his freedom of movement, would not be liable for his death.

Id. (citations omitted).

Application of the reasonableness standard in a Fourth Amendment seizure case "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor, 490 U.S. at 396, 109 S.Ct. at 1872.*[20] Moreover, the standard of reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* The various officers' and officials' intents and motives are irrelevant. *Id. at 397, 109 S.Ct. at 1872.* In reviewing the officers' actions, a court should bear in mind that "great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." *Scheuer v. Rhodes, 416 U.S. at 248, 94*

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20 Although the Court decided *Graham v. Connor* four years later the MOVE confrontation, it still controls our determination of whether there was a Fourth Amendment violation. Only when we decide whether the law was established clearly do we need to limit our survey of the law to that which predates May 13, 1985.

S.Ct. at 1692 (quoting *Moyer v. Peabody, 212 U.S. 78, 85, 29 S.Ct. 235, 237, 53 L.Ed. 410 (1909)).*

I therefore examine first the information possessed by the various officials at the time of the events at issue to determine if their conduct was objectively reasonable. *See Anderson v. Creighton, 483 U.S. at 641, 107 S.Ct. at 3040.* In this objective reasonableness analysis, I primarily consider the case from the perspective of Brooks, Sambor, and Richmond as they were the supervisory officials on the site. It is fair to say that at the beginning of May 13, 1985, the defendants knew or reasonably believed the following: (1) MOVE had been involved in a prior episode of violence against the police which resulted in a death of a police officer; (2) at least one MOVE member had been seen earlier with a gun; (3) MOVE members had threatened police officers and neighbors with violence and use of guns and explosives; (4) MOVE members may have dug tunnels under their house; and (5) it was likely that MOVE members would resist arrest.

From their experiences on the morning of May 13, 1985, it is fair to say that these same defendants knew or reasonably believed the following: (1) certain MOVE members expressed that they would not surrender peacefully and threatened to kill the police officers; (2) certain MOVE members were shooting at the police; (3) some of the gunfire seemed to have come from the bunker atop the roof; (4) efforts at creating holes on the sides of the MOVE house and injecting tear gas into the house were unsuccessful; (5) there were children in the basement of the MOVE house; and (6) MOVE members have made no signs that they were willing to surrender.

It is simply beyond argument that a reasonable officer on the scene possessing the above information would believe that there were armed and dangerous people inside the MOVE house who posed a serious threat to the life and safety of

officers and neighbors, should they escape. Furthermore, although the plaintiffs contend that there had been no gunfire from the MOVE house for hours before the use of the explosive, I believe this fact, if true, would be irrelevant. No reasonable officer would think that the danger finally had subsided and that police officers could come to the house safely and arrest the occupants merely because the MOVE members had held their fire for several hours.[21]

Of course, it is irrelevant that only a few weapons were found in the rubble afterwards, that Ramona Africa was not involved in the 1978 confrontation. The first two allegations are not something that any of the officials or officers had any reason to know with any degree of certainty at the time and, in any event, a person with a single weapon can fire a fatal shot. Thus, this case would be no different even if the defendants believed all along that there were only a few weapons in the premises. The allegations regarding Africa's peaceful nature are also irrelevant because even if the defendants were aware of them, they would have been justified in believing that the other persons in the house were

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21 I thus find Judge Lewis' assertion that "several hours had elapsed between the cessation of gunfire from within the MOVE dwelling and the dropping of the incendiary device by the police" to be beside the point. *Dissent at 979.* The fact of the matter is that, in light of the massive gun battle earlier in the day, which in turn must be seen in light of MOVE members' consistent threatening conduct, the police had every reason to believe that the MOVE members could begin shooting again at any moment. It seems self-evident to me that the inquiry should focus on the police officers' reasonable belief about the threat of violence, not on the fortuitous fact that at the moment the bomb was dropped bullets were not descending from the building.

armed and dangerous.[22] The presence of one peacefully inclined occupant could have in no way impacted on the overall situation.

Once it was clear that the insertion teams could not complete their mission, and that the MOVE members still were not cooperating, it cannot be said that it was anything but reasonable for the officials to develop alternative ways to proceed in their mission to arrest these dangerous people. Nor can it be said that it was unreasonable for the defendants to choose to attempt to conclude the stand-off, or at least destroy the bunker, by sundown given the higher risks they perceived to be coming with nightfall.[23]

The record shows that the defendants had discussed various ways of neutralizing the bunker, which all perceived as a great danger to the officers below, and of effectively inserting tear gas into the house. And when they focused on the option of using a helicopter to drop an explosive on the bunker to neutralize it and to create a hole in the roof, they also discussed the potential for fire and for injury to the people in the house. They believed from their inquiries of Powell, an officer in the Bomb Squad, that these risks were very low. Was this belief reasonable given the fact that at least certain of the defendants had known that there was a possibility, or at least a threat by MOVE, that there was incendiary and/or explosive materials in the house? I cannot say that a

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22 In fact she was not inclined, peacefully as, according to certain of the briefs, she was convicted of riot and conspiracy for her participation in this episode.

23 While Judge Lewis concludes that the individual defendants used excessive force, he offers no explanation of what alternatives were available. Apparently he is willing to have mandated an indefinite standoff.

reasonable officer could not have held such a belief that the risks were low. First, the defendants were entitled to rely n the statements of Officer Powell regarding the characteristics of the explosive. Second, explosives had been used on the sides of the house in the morning without causing any fires. And third, these officials believed that they had seen muzzle flashes on the roof, which could have led them to believe that a small spark may not be terribly dangerous, especially given the fact that the roof had been well doused with water all day. Thus, I do not think it unreasonable for them to have believed that explosives could be used to eliminate the bunker.[24]

I believe that the decision to let the fire consume the bunker was not an unreasonable use of force. *Barna v. City of Perth Amboy, 42 F.3d 809, 820 (3d Cir. 1994).* There is no question that the bunker still was standing after the explosive was deployed. In fact, the explosive missed it altogether. The only basis in the record for the district court's conclusion that the bunker was "substantially neutralized on the impact of the bomb," appears to derive from Brooks' testimony. Brooks testified that when he told Sambor to put the fire out, he said, "[Y]ou've accomplished your mission, put out the fire." App. at 1016. That the bunker substantially was neutralized was, as I read the record, solely Brooks, expectation of the effect of the explosive. Brooks testified:

> Q. Now, when you say the bomb would neutralize the bunker even if it didn't knock it off, what do you mean?

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24 Nor am I persuaded to reach a different conclusion by the fact that the satchel contained certain explosive materials generally used only by the military. Whatever was in the satchel was not enough to do much structural damage upon explosion since the bunker was still standing. To say that the explosive was "military strength," I believe, is quire misleading.

A. It would be very difficult to stay up there.

Q. Well, did you feel there was any discussion that if there were any human being inside the bunker, he would be injured or killed to the point or injured to the point that he would not be able to take offensive action?

A. I think so.

App. at 986. The district court incorrectly concluded from Brooks' statements that the explosion in fact neutralized the bunker.

Furthermore, there is no evidence that either Sambor or Richmond believed the bunker had been neutralized when they agreed to let the fire burn it. Looking from *each defendant's position,* a court must assess the reasonableness of the actions of Brooks, Sambor, and Richmond based on the information and beliefs they each held at the time. A court must take care not to impute one official's beliefs and information to another official to hold his actions unreasonable in the circumstances. In this case, I see that although Brooks may have thought that the mission was accomplished by the explosion, Sambor and Richmond believed differently. In Brooks' case, then, it may be rational to go on to determine whether letting the fire burn down a seemingly neutralized bunker was reasonable. But a reasonable official in the position of the other officials surely did not have to have this state of mind. Both Sambor and Richmond were on the street when Brooks called them about the fire. They testified that they saw smoke, but no flames. And the bunker still was standing. From Sambor's and Richmond's point of view, the explosive did not neutralize the bunker, thus explaining the need to "get the bunker." There may not have been anyone in the bunker after the explosion, but this was also the case before the explosion. Surely this fact cannot be taken as

assurance that no one would emerge soon from inside the house and perhaps resume the offensive position taken in the morning. Indeed, the district court implicitly found, and I concur, that the absence of people on the roof or in the bunker did not render unreasonable the earlier decision to use the explosive to "get the bunker." This same reasoning should apply after the explosion. The bunker, for these two officials, was still as justifiable a target as it was before the explosion.

Thus, the question for Sambor and Richmond becomes, if they each believed that the bomb failed to neutralize the bunker, whether it was reasonable for them to let the fire carry out that objective. Again, a court needs to approach this question from the separate position of these two individuals. From Sambor's point of view, he had a confirmation from an experienced fire fighter that the fire could be controlled. He knew that many fire fighters were at hand and ready to "start the squirts." It seems clear that a reasonable police official in Sambor's position could have believed that a controlled fire was a reasonable means to destroy a bunker which still posed a threat.

Richmond's point of view, although he also knew that he had plenty of fire fighters ready to putout the fire at his command, is more problematic.[25] It is undisputed that photographs showing cans marked "gasoline" n the roof were passed around in a prior meeting of officials at which Richmond was present. However, there is no evidence that any official from either the police department or fire department knew that there was gasoline on the rooftop prior to the disaster on May 13, 1985. Furthermore, Richmond knew on May 13, 1985, that cans marked "gasoline" on another MOVE house in Chester, Pennsylvania, actually

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25 The evidence shows, and the district court found, that Richmond played no part in the decision to drop the explosive on the bunker.

contained water. Richmond admits, however, that it would have been unreasonable to let the fire burn if he knew there was gasoline on the roof. Given the information possessed by Richmond at the time, including the fact that he was there not to fight any fires that he may see, as would be his normal duties, but to lend support to the police effort, we cannot say that this "split-second judgment -- in circumstances that are tense, uncertain, and rapidly evolving --" was not objectively reasonable under the Fourth Amendment. *See Graham v. Connor, 490 U.S. at 397, S.Ct. at 1872.*

I look at Brooks' situation based on plaintiffs' version of the facts and assume *arguendo* that he believed the bunker to have been effectively neutralized by the explosive and that he concurred, at least for a time, in the decision to let the fire burn the bunker. Nevertheless, I do not believe that this decision, even taken in this light, would be unreasonable. The objective, it must be remembered, was to destroy the bunker which still was standing and could be reoccupied.

To summarize, I find that the record does not indicate that there was a Fourth Amendment seizure of the MOVE members, a conclusion which in itself in my view ends the federal aspects of the case. I further would hold that even if there was a Fourth Amendment seizure, the defendants' decisions to destroy the bunker by dropping the explosive and allowing the fire to burn were not objectively unreasonable under the Fourth Amendment. I thus conclude that the city defendants are entitled to summary judgment on the federal claims.

D. Apparent Lawfulness of the Conduct

[11] I will assume, however, that the defendants did effect a Fourth Amendment seizure, and I will assume further that the seizure was unreasonable. I then inquire whether the

city defendants still are entitled to qualified immunity on the basis that they reasonably could have considered their conduct would be lawful. I have no difficulty concluding that they are entitled to such immunity. Judge Scirica comes to the same conclusion and thus he joins in this section "D. Apparent Lawfulness of the Conduct," of the opinion.

In *Harlow v. Fitzgerald,* the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *45 U.S. at 818, 102 S.Ct. at 2738* (citations omitted). The Court later explained:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 640, 107 S.Ct. at 3039 (citations omitted).

Thus, the relevant question here is "the objective (albeit fact-specific) question whether a reasonable officer could have believed" the use of the explosive and of the fire to destroy the bunker, based on the information the defendants then possessed, to be reasonable under the Fourth Amendment, that is, "to be lawful, in light of clearly established law" as of May 13, 1985. *See Id.*

This court has interpreted the standard of "clearly

established law" to require "some but not precise factual correspondence between relevant precedents and the conduct at issue," and that "[a]lthough officials need not predict the future course of constitutional law, they are required to relate established law to analogous factual settings." *Ryan v. Burlington County, 860 F.2d 1199, 1208-09 (3d Cir. 1988), cert. denied, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989)* (quoting *People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144 (3d Cir. 1984)).*

The district court relied and the plaintiff's rely on *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694,* and section 508 of the Crimes Code as the "clearly established law" which should have been related by the defendants to the factual setting facing them. The defendants argue correctly that violation of state law is in itself not determinative in this section 1983 action. *See Brown v. Grabowski, 922 F.2d at 1113.* Yet I do not fault the district court for referring to Pennsylvania law, as the court cited that law to show that its violation could be considered in determining the scope of the clearly established constitutional right of an arrestee. Thus, the state law could help define the scope of federal law. And, indeed, the Supreme Court did cite section 508 in developing its constitutional standard.

But the defendants argue quite persuasively that the district court erred in relying on *Tennessee v. Garner.* In that case, decided less than two months prior to May 13, 1985, a police officer shot and killed an unarmed teenage burglary suspect to prevent his escape. *Tennessee v. Garner, 471 U.S. at 3-4, 105 S.Ct. at 1697.* The Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id. at 11, 105 S.Ct. at 1701.* However, "w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

prevent escape by using deadly force." Id. The Court concluded that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id. at 11-12, 105 S.Ct. at 1701.*

I agree with the defendants that *Tennessee v. Garner* is far from an analogous case. We are concerned here with the use of the explosive and the burning of the bunker to provide a safe means to inject tear gas into a house to arrest the armed and dangerous occupants barricaded inside. There is only a very broad and vague similarity between *Tennessee v. Garner* and this case: there was use of great force in both in some aspect of the process of effectuating an arrest. As can be expected, extensive research has revealed no case that justly can be deemed analogous.

This court's cases do not support use of such an attenuated connection as the district court seemed to have done here with its use of *Tennessee v. Garner.* For example, in *Ryan v. Burlington County, 860 F.2d at 1208-09,* this court extended the clearly established law regarding rights of inmates to deny qualified immunity to defendants even though prior case did not involve officials in the precise positions held by the defendants. And in *Good v. Dauphin County Social Serv., 891, F.2d at 1094-95,* this court applied clearly established case law regarding warrantless searches to a case where the novelty was that the search was to prevent child abuse. In *Sourbeer v. Robinson, 791, F.2d 1094, 1103-04 (3d Cir. 1986), cert. denied, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 779 (1987),* this court affirmed the district court's reliance on clearly established law regarding the due process rights of sentenced inmates to hold that defendants were on notice as to similar rights of an unsentenced inmate. In *Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987),* this

court applied the clearly established law that prohibited dismissal of public employees in retaliation for political speech or association to a case where the employee was demoted. Similarly, in *Burns v. County of Cambria, 971 F.2d 1015, 1024-25 (3d Cir. 1992), cert. denied, _____ U.S. _____, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993),* this court applied that same law to the dismissal of deputy sheriffs in particular.

At the defendants' behest, both the district court and the magistrate judge examined *Ginter v. Stallcup, 641 F.Supp. 939 (E.D.Ark. 1986),* as a possible factual precedent. That case involved an effort by local police officers and FBI agents to capture a fugitive charged with murder who was hiding in a residence and apparently was firing at the officers with automatic weapons. The officers introduced tear gas and diesel fuel into a vent on the roof of the house and set fire to it. The district court concluded that there was no "clearly established law" prior to the event that would hold that "the use of fire to 'burn out' a fugitive would violate the constitutional rights of the fugitive." *Id. at 953.* On appeal, the Court of Appeals for the Sixth Circuit upheld the grant of qualified immunity to the two defendant officers with respect to the claim of unnecessary destruction of property, on the basis that unless the officers knew of the fugitive's death before the fire, they had not been shown to have acted unreasonably in setting the fire. *Ginter v. Stallcup, 869 F.2d 384, 389 (8th Cir. 1989).*

But *Ginter v. Stallcup,* as the district court in this case pointed out, was decided in 1986, though it involved an event that took place in June 1983, which was before the MOVE episode. In these circumstances, *Ginter v. Stallcup* could not possibly be used to demonstrate clearly established law as of May 13, 1985. Furthermore, as the magistrate judge noted, *Ginter v. Stallcup* involved a handful of police officers [who] had to take immediate action against an armed murdered" as opposed to the situation here, where "the police presence ...

was on a massive and well-equipped scale." *Id. at 360.* While *Ginter v. Stallcup* is easily distinguishable, the fact that it is as factually close a case as anyone can find offers some insight for our inquiry as to whether the alleged unlawfulness here was "apparent."

Nevertheless, I recognize that in certain instances the alleged act is so obviously wrongful that all reasonable officials would consider it unlawful, regardless of whether the act itself was addressed by case law. For example, in *Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir, 1989),* public school officials were sued for allegedly condoning two teachers' acts of sexual misconduct against students. This court did not require that there be an analogous case in which sexual abuse of a student or the allowing of such abuse was held to have violated the student's constitutional rights. Rather, it "seem[ed] ludicrous to be obliged to consider whether it was 'clearly established' that it was impermissible for school teachers and staff to sexually molest students." *Id. at 726-27.* In other words, the alleged act of condoning sexual misconduct by teachers against students so clearly violated the student's constitutional rights that the unlawfulness of this act was apparent, even in the absence of an analogous case. The *Stoneking* approach sensibly precludes an official from obtaining summary judgment if he acts in a way that no other official has acted because other officials recognize the acts to be clearly unlawful. Of course, that approach has no place in this case.

Overall, it is clear that even if somehow a court found that there was an unreasonable seizure in this case, it could not possibly say, in the words of *Anderson v. Creighton,* "that in the light of pre-existing law the unlawfulness" of either dropping the explosive or letting the fire burn should have been apparent. *483 U.S. at 640, 107 S.Ct. at 3039.* The 1985 MOVE confrontation was unprecedented in the case law. The exceptional circumstances here constitute precisely the

kind of situation that requires the firm and swift official action which must be shielded by qualified immunity. I conclude that there was no clearly established law as of May 13, 1985, which would have required the officials to choose an alternative approach to execute the warrants. Thus, as Judge Scirica joins in this section of the opinion the city defendants, meaning the individual defendants, are entitled to qualified immunity on the federal claims.

V. LIABILITY OF THE CITY

The district court concluded that Brooks' concurrence in the decision to let the bunker burn means that the city is suable under section 1983. Alternatively, even if Brooks did not concur, the district court found that decisions made by Sambor or Richmond were sufficient so that the city could be held liable. Because I would hold that the city defendants are entitled to summary judgment on the federal claims on the grounds that their actions did not amount to constitutional violations, as there was no seizure at all, I would hold that the city also is entitled to summary judgment on the federal claims. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611*(1978)* (municipalities cannot be held liable under section 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort"); *Kentucky v. Graham, 473 U.S. 159, 171, 105 S.Ct. 3099, 3108, 87 L.Ed.2d 114 (1985)* (plaintiffs who did not prevail in official-capacity action was not "entitled to look for relief, both on the merits and for fees, to the governmental entity"). While this court indicated in *Fagan v. City of Vineland, 22 F.3d 1283, 1291-94 (3d Cir. 1994),* that in some circumstances a city may be liable even though its officers are not liable, I see no basis here to impose independent liability on the city. *See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986).* Judges Scirica and Lewis disagree with this conclusion for the reasons they express and

thus we will affirm the order denying the city summary judgment.

VI. GRANT OF SUMMARY JUDGMENT IN FAVOR OF GOODE, POWELL, AND KLEIN AS TO THE STATE LAW CLAIMS

[12] In light of the conclusions Judge Scirica and I have reached with respect to qualified immunity and in light of the reasons Judge Scirica is setting forth separately, we will affirm the judgments in favor of Goode, Powell, and Klein on the state law claims. The magistrate judge explained, and the district court summarily agreed, that as employees of the city, officials are entitled to statutory immunity unless "it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct." *42 Pa.Cons.Stat.Ann. §8550 (1982).* I agree as well. Thus, in my view the finding that the dropping of the explosive was lawful establishes that Goode, Powell, and Klein did not lose their immunity under this section.

VII. CONCLUSION

I cannot conclude our opinion without an overview of the matter. In retrospect, there can be no doubt that the defendants' actions had tragic consequences. Yet there is not the slightest doubt that it was MOVE and not the defendants who put the forces in motion which created the tragedy for the MOVE members placed the defendants in an impossible situation. Because of their obvious contempt for the orderly implementation of the judicial process, they forced the defendants to undertake a military-type operation. In a country operating under an organized legal system the response of a person confronted with an arrest warrant must be to surrender. Unfortunately the occupants of the MOVE

house did not recognize this obvious truth. Finally, I point out that the courts must recognize that in certain instances the civil authorities are required to take strong steps to enforce the law and maintain public order. The Constitution does not preclude these steps.

In view of the conclusions set forth by Judge Scirica and Judge Lewis, the orders for summary judgment with respect to all claims in favor of defendants Goode, Powell, and Klein will be affirmed. The orders denying summary judgment with respect to all federal claims in favor of Brooks, Sambor, and Richmond, will be reversed and on remand the district court should enter summary judgment in their favor on those claims. The order denying the city summary judgment will be affirmed but on the further proceedings on remand the district court shall consider the claims against the city in accordance with the reasonableness standard Judge Scirica and I have adopted. We note that the district court granted the city partial summary judgment with respect to the dropping of the bomb and that no appeal from that order is pending. Nevertheless, the rationale adopted by Judge Scirica and Judge Lewis leads to the conclusion that the city was not entitled to summary judgment on that point. Thus, while we do not disturb that unappealed summary judgment, we observe that the plaintiffs might want to seek relief from it in the district court under Fed.R.Civ.P. 54(b) or Fed.R.Civ.P. 60(b)(6). The appeals by Brooks, Sambor, and Richmond from the denial of summary judgment on immunity grounds on the state law claims will be dismissed for lack of jurisdiction as will James' appeal from the order of the district court granting the city summary judgment on her uncompensated property damage claim. We will remand the matter for further proceedings consistent with this opinion and for disposition of the remaining claims. The parties will bear their own costs on this appeal.

SCIRICA, Circuit Judge concurring and dissenting.

I agree with Judge Greenberg that all individual defendants are entitled to qualified immunity. Although I agree that the proper analysis on the use of excessive force in effecting an arrest is found in *Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989),* rather than in *Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985),*[26] *I do not believe that as a matter of law no reasonable jury could conclude that the decision to employ the incendiary device was an excessive use of force.*[27] Accordingly, with Judge Lewis, I hold that

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26 In *Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989),* the Court held, "[A]ll claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard..." Applying this standard to determine "whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id. at 396, 109 S.Ct. at 1871* (citation omitted).

I believe *Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985)* is limited by its facts. *Garner* assessed the reasonableness of force used in a particular factual setting but did not provide the definitive reasonableness test for all seizures involving the use of deadly force. Although I believe the police may have used deadly force against the MOVE members, that confrontation is readily distinguishable from the situation in *Garner.*

27 The district court analyzed the decision to drop the incendiary device separately from the decision to let the bunker burn. Unlike the district court, I see little distinction between dropping the

the federal claims asserting an unconstitutional seizure in violation of the Fourth Amendment against the City of Philadelphia survive summary judgment and may proceed to trial.

Furthermore, I would hold that we may consider an interlocutory appeal of the denial of state immunity when the state immunity question is bound up with federal qualified immunity and that the individual defendants are entitled to summary judgment on the state claims because the officials' conduct did not rise to the level of willful misconduct.

I.

I believe there was a seizure under the Fourth Amendment. The Osage Avenue house was occupied by the subjects of the arrest warrant and the officials used force with the aim of gaining entry into the house or forcing the occupants out. The incendiary device was "the very instrumentality set in motion or put in place in order to achieve that result." *Brower v. County of Inyo, 489 U.S. 593, 599, 109 S.Ct. 1378, 1382, 103 L.Ed.2d 628 (1989).* In *Brower,* the Court noted that a Fourth Amendment seizure does not occur when the effect of seizure is purely fortuitous.[28] But

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incendiary device and letting the fire burn. Both actions were undertaken to effect the same result -- to enable the police to insert tear gas into the house in order to force the occupants out. The risk of fire existed from the moment the device was dropped, and very little time elapsed between dropping the device and deciding whether to respond to the fire.

[28] To illustrate the point, the Court laid out two scenarios: (1) where a parked and unoccupied police car slips its brake and pins an innocent passerby against a wall; and (2) where the accidentally pinned passerby happens to be a serial murdered for whom there is an outstanding arrest warrant. The Court said there could be no seizure in

the Court cautioned that we cannot say there was not a seizure when an individual is "stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg." *Id. at 598-99, 109 S.Ct. at 1382.* Thus, our inquiry is not whether the officials intended all the consequences of their use of the incendiary device, but whether they intended to use force to arrest these individuals. I conclude that they did, and because the MOVE members were harmed by the fire caused by the incendiary device, "the very instrumentality set in motion or put in place in order to" arrest the occupants of the house, I find a Fourth Amendment seizure. *Id. at 599, 109 S.Ct. at 1382.*

II.

I do not believe that we can say, as a matter of law, that no reasonable jury could conclude that the decision to use the incendiary device was an excessive use of force. Both the reasonableness of the decision to end the confrontation before nightfall rather than allow the stand-off to continue and the reasonableness of the choice of means to end the stand-off -- eliminating the bunker with an incendiary device -- are questions of fact.[29] Also, the reasonableness of the officials'

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either case because there was no "governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo, 489 U.S. 593, 597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989).* The intent referred to in the phrase, "through means intentionally applied," does not go to the intent of seizure. It is irrelevant that the serial murderer's arrest was otherwise intended. What matters is whether the means -- e.g., the car -- was intentionally applied to this individual.

29 The degree of risk posed by the use of the incendiary device is disputed. But questions about the contents of the incendiary device and the awareness of the officials that gasoline or other explosives may have been in the vicinity of the bunker are properly left to the trier of fact.

views of the threat of the bunker after the incendiary device was dropped and the reasonableness of their decision to let the fire burn the bunker are questions of fact. Accordingly, I find summary judgment is inappropriate on the question of whether the plaintiffs' Fourth Amendment rights were violated by an unreasonably excessive use of force. Of course, as stated, I believe all individual defendants are entitled to qualified immunity.

III.

[13] Because I cannot say, as a matter of law, that there has been no Fourth Amendment violation, *Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978),* does not relieve the city of liability. Under *City of St. Louis v. Proprotnik, 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988),* and *Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986),* we must consider whether the acts of the municipal officers may be attributed to the city. I believe that their actions meet the standards outlined in those cases, and I hold the city responsible for the acts of these officials. Furthermore, under *Owen v. City of Independence, 445 U.S. 622 650, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980),* the city does not have qualified immunity from liability even if it can show that the officials themselves are entitled to immunity from personal liability under §1983.

IV.

Under the facts here, I believe we may consider an appeal of the district court's denial of a claim of state immunity. In *Brown v. Grabowski, 922 F.2d 1097, 1109, (3d Cir. 1990), cert. denied, 501 U.S. 1218, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991),* we concluded that a denial of a claim of qualified immunity premised upon New Jersey state

law was not appealable. But in *Brown* we conducted a three-step inquiry: First we looked to the statute, then we looked to interpretations of that statute by the state's courts, and finally we looked to see whether the state disfavored interlocutory appeals. In *Brown,* after reviewing the statute and case law, we believed the appealability issue could go either way. But because New Jersey had a policy strongly disfavoring interlocutory appeals, we dismissed for lack of jurisdiction. Applying the same analysis here, I would reach the opposite conclusion.

I agree that the language of Pennsylvania's Political Subdivision Tort Claims Act does not contemplate immunity from suit but only immunity from liability. But that is not necessarily dispositive. My reading of *Brown* is that when there are issues of federal immunity, we are required to take a closer look at a state's approach to immunity. In Pennsylvania, that closer look embraces *Lancie v. Giles, 132 Pa.Cmwlth. 255, 572 A.2d 827, 829 n. 3 (1990). Lancie* noted that the United States Supreme Court's emphasis on the appealability of summary judgments denying federal qualified immunity makes the issue of appealability of denials of state statutory immunity more difficult when cases also involve issues of federal immunity. The Pennsylvania Supreme Court has not addressed this question, but in the absence of guidance from the state supreme court, we should look to decisions from the lower state courts. *See Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273-74 (3d Cir. 1985)* ("Although lower state court decisions are not controlling on an issue on which the highest court of the state has not spoken, federal courts must attribute significant weight to these decisions in the absence of any indication that the highest state court would rule otherwise."). I believe this signal from *Lancie* is strong enough to tip the balance in favor of hearing the interlocutory appeal of the denial of summary judgment on the state law immunity claims.

I also would grant summary judgment on the state immunity question because, as a matter of law, the individual defendants' conduct did not rise to the level of willful misconduct.[30] Pennsylvania Political Subdivision Tort Claims Act denies immunity to an employee of a local agency when the employee's action constituted "a crime, actual fraud, actual malice or willful misconduct." *42 Pa.Const.Stat. §8550 (1990).* Pennsylvania courts have defined "willful misconduct" to mean "conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied." *King v. Breach, 115 Pa.Cmwlth. 355, 540 A.2d 976, 981 (1988)* (citing *Evans v. Philadelphia Transp. Co., 418 Pa. 567, 212 A.2d 440 (1965)).*

Recently, in *Renk v. City of Pittsburgh, 537 Pa. 68, 641 A.2d 289, 294 (1994),* the Pennsylvania Supreme Court rejected the City of Pittsburgh's exclusive reliance on a jury finding in a federal action that an officer was liable for using excessive force to establish willful misconduct. This indicates that the Pennsylvania Supreme Court requires a higher standard than excessive force for finding willful misconduct sufficient to defeat immunity under the Tort Claims Act. Furthermore, I believe the statement in *Lancie* about the difficulty created by differing state and federal standards on immunity signals that Pennsylvania will defer to the federal standard and deny immunity only where the actor had reason to know that his actions violated clearly established rights.

V.

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30 The district court granted summary judgment to the city on the state law claims because it found that the city had not properly made itself suable beyond the categories of cases contemplated by the Pennsylvania Political Subdivision Torts Claims Act. The statute sets out a list of eight acts that may result in the imposition of liability on a local agency. Effecting arrest of individuals is not one of the enumerated actions.

Except as otherwise noted, I join Judge Greenberg's holdings, even though I do not agree with every detail of his opinion.

LEWIS, Circuit Judge, concurring and dissenting.

I join in Parts II and III of Judge Greenberg's opinion and in Part I (Factual Background) insofar as it recounts the undisputed facts as revealed and supported by the record. For the reasons I discuss below, however, I do not join in Parts IV through VII of Judge Greenberg's opinion.

I.

I begin by setting forth my agreement with Judge Scirica that no distinction should be drawn between the decision to drop the incendiary device and the decision to let the fire burn. As Judge Scirica observes, both actions were undertaken to effect the same result, namely, to enable the police to insert tear gas into the house in order to force the MOVE occupants out. I also agree with Judge Scirica, for the reasons stated in his concurring and dissenting opinion, that the police effected a Fourth Amendment seizure in this case.

Finally, I join Judge Scirica in holding that the federal claims asserting an unconstitutional seizure in violation of the Fourth Amendment against the City of Philadelphia survive summary judgment and may proceed to trial. However, I do not agree with either Judge Scirica or Judge Greenberg that *Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989),* provides the proper analytic framework for assessing the constitutionality of the use of force in this case. Instead, it is plain to me that *Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985),* provides the proper test.

II.

THE MAJORITY'S ERRONEOUS CONCLUSION AS TO THE APPLICABLE STANDARD

Judge Greenberg concludes that the city defendants' use of the incendiary device and ensuing fire to effect the seizure of the MOVE occupants did not constitute *deadly* force. While Judge Scirica acknowledges that deadly force may have been used against the MOVE members, he believes that *Garner* is limited by its facts and distinguishable from the confrontation here. *See* Judge Scirica's concurring and dissenting opinion at 973 n. 1. Thus, the majority concludes that the district court erred in applying *Garner*, a case involving the use of deadly force, to assess the constitutionality of the use of force against MOVE. Instead, the majority holds that the district court should have applied the reasonableness test described in *Graham*, a case involving the use of *non-deadly* force, to test the constitutionality of the use of force in this case. In so holding, I believe Judge Greenberg misapprehends the nature of the force contained in the incendiary device and the ensuing roof-top fire, and I believe that Judge Scirica overly limits *Garner's* reach.

A.

The force embodied in the incendiary device and in the fire was, by any sensible standard, "deadly" force. It should not escape our attention that the destructive device in question was a bomb capable of blasting a hole in the roof of a city building. This lethal device could and did accomplish a degree of destruction well beyond that which even bullets fired from a high-powered weapon could achieve. To me, this constitutes deadly force, for I cannot imagine how anyone can conclude that a device such as this was not capable of taking human life -- which, in fact, it ultimately did. Contrary

to the conclusion drawn by the majority, I believe the city defendants, who were professional law enforcement and fire-fighting personnel, had *every* reason to know that their actions created a substantial risk of death or serious bodily injury to the MOVE members residing at 6221 Osage Avenue. See Model Penal Code §3.11(2) (defining "deadly force" as "force which the actor uses with the purpose of causing or which he [or she] *knows to create* a substantial risk of causing death or serious bodily harm") (emphasis supplied).

Moreover, I would conclude that the dropping of the explosive device would have constituted the use of deadly force even had no fire ensued as a result of this act. The intention of the defendant officials in dropping the explosive device was to blast the bunker from atop the roof. This intention must be considered in light of the fact that the defendant officials had no way of knowing whether the bunker was occupied at the time the explosive device was deployed. The only viable conclusion, given the bomb's p and the reasonable (and unexplored) possibility that the bunker was occupied at the time the bomb was dropped, is that in dropping the explosive device, the defendant officials knew that they were creating a substantial risk of causing death or serious bodily harm. Had the defendant officials' objective to blast the bunker from the roof been fulfilled, and had the bunker been occupied at the moment of impact, the bunker's occupant or occupants would have been forcibly thrown from the roof of 6221 Osage to the street below. The substantiality of the risk of death or serious bodily injury from such a fall is self-evident and beyond debate.

In light of reason, experience and the applicable standard, I could not disagree more strenuously with Judge Greenberg's conclusion that in dropping the explosive device onto the roof of an occupied building and in letting a fire spread upon that occupied building's roof, the city defendants did not use deadly force. In addition, and putting aside the

fact that a fire ensued, I cannot accept Judge Greenberg's conclusion that in dropping the device to blast the bunker off of the roof, city officials did not know they were creating a substantial risk of death or serious bodily harm.

B.

The majority concludes that *Garner* is inapplicable and that "the appropriate inquiry is the reasonableness of the city defendants' acts." *Maj.Op. at 965.* I am perplexed by this conclusion, for in reaching its holding regarding the constitutionality of deadly force used in the course of an arrest, the Supreme Court in *Garner* applied and relied upon the reasonableness test embodied in the Fourth Amendment. *See Garner, 471 U.S. at 7-12, 105 S.Ct. at 1699-1702* (there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

The majority implies that *Garner* and *Graham* are incompatible cases. In fact, *Garner* and *Graham* are complementary cases. As the district court noted, the Supreme Court in *Garner* for the first time analyzed within the reasonableness framework of the Fourth Amendment an excessive force claim arising in the context of an arrest. *See Africa v. City of Philadelphia, 809 F.Supp. 375, 379 (E.d.Pa. 1992)* (explaining that prior to *Garner*, excessive force claims were analyzed under the "shocks the conscience" standard). In doing so, the Court squarely addressed the very issue we confront here, namely, the constitutionality of the use of deadly force by law enforcement officials in the course of an arrest. In *Graham*, the Court merely "ma[de] explicit what was implicit in *Garner's* analysis," by holding that "all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest ... should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." *Graham, 490 U.S. at 395,*

109 S.Ct. at 1871 (emphasis in original). The Court then proceeded to apply the reasonableness test to the use of *non-deadly* force, as it had already done with regard to the use of *deadly* force in *Garner.*

Taken together, then, *Garner* and *Graham* establish the following set of complementary principles: (1) the reasonableness test under the Fourth Amendment is to be used when assessing the constitutionality of police employment of force in the context of an arrest; (2) when the force employed constitutes "deadly force," the constitutionality of its use is to be determined according to the reasonableness test set forth in *Garner,* and such force is deemed unreasonable unless it is "necessary to prevent the [suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others[,]" *Garner, 471 U.S. at 3, 105 S.Ct. at 1697;* and (3) when the force employed is non-deadly, the constitutionality of its use is to be assessed according to the factors enumerated in *Graham.* Thus, while *Garner* and *Graham* do establish a complementary set of principles, *Garner* is appropriately applied to situations, such as this one, involving the use of deadly force, whereas *Graham speaks to and controls situations involving the use of deadly force.* They share a focus upon the use of excessive force, but it is the nature and degree of that excessive force which dictates their respective applications.

Accordingly, while I agree with Judge Scirica that as a matter of law, a reasonable jury *could*, under *Graham*, conclude that the decision to employ the incendiary device was an excessive use of force, because I believe that this case involves the use of deadly force, and in light of my understanding of the relationship between *Garner* and *Graham,* I think the proper test for determining the constitutionality of the use of force in this case is found in

Garner, and not in *Graham.*[31]

Our disagreement as to applicable test is not without considerable significance. As should be clear, if *Graham* is the appropriate standard by which to determine the constitutionality of the use of force here, then general reasonableness factors would guide a jury's determination as to whether excessive force was used. By stark contrast, *Garner* would not invite a jury to be guided by the more flexible general reasonableness standard. *Garner* imposes a stricter standard governing police conduct and the use of excessive force -- and with good reason, since the intrusiveness of deadly force is qualitatively distinct from all other forms of excessive force. Accordingly, *Garner* defines and explains the *reasonableness* of the excessive force to which it is addressed -- deadly force -- in narrower terms. In other words, while the reasonableness inquiry is a common component with regard to both standards, that inquiry is, and should be, more precise and exacting when deadly force has been used. Thus, if *Garner* were applied, a jury wold be asked more pointedly to determine whether the deadly force employed was reasonable because it was necessary to prevent the escape of suspects believed to pose a significant threat of death or serious physical injury to the police or others. It is this test, and not the more lenient *Graham* standard, by which the propriety of the law enforcement officers' decisions in this case should be gauged. And, as I have already indicated, I believe that under *Garner* only one reasonable conclusion can be reached here: the city defendants used excessive force.

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31 I agree with Judge Scirica that under *Graham, a* jury question exists as to whether excessive force was used in this case. However, as I have sated, I do not believe that *Graham* controls this case. I believe that *Garner* controls, and under *Garner,* it is clear to me that the deadly force used her was excessive as a matter of law and, therefore, unlawful.

III.

THE MAJORITY'S ERRONEOUS CONCLUSION AS TO THE APPLICABILITY OF QUALIFIED IMMUNITY

The majority states that it has no difficulty concluding that the individual defendants are entitled to qualified immunity because they reasonably could have considered their conduct to be lawful. *Maj.Op. at 969-970.* I disagree. I would hold that the individual defendants are not entitled to qualified immunity. Further, I believe that the source of the majority's error here flows directly from its misunderstanding and misapplication of our construction of the term "clearly established law," in the wake of the Supreme Court's decision in *Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982),* which first articulated that standard.

As the majority correctly observes, the relevant question here is whether a reasonable officer, possessing the same information as did the defendants, could have believed that the use of the incendiary device and fire to destroy the bunker was reasonable under the Fourth Amendment, that is, "lawful, in light of clearly established law" as of May 13, 1985. *See Anderson v. Creighton, 483 U.S. 635, 640 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).* Accordingly, our task is to determine what the "clearly established law" governing the defendants' actions was on that date. The majority argues that there was no clearly-established law on the date in question which would have required the officials to choose an alternative approach to executing the warrants. *Maj.Op. at 971-972.* In failing to grasp the breadth of the "clearly established law" standard, and in thus failing, once again, to recognize the applicability of *Tennessee v. Garner* to the events in question, the majority has erred.

As I have already noted, in *Garner,* which admittedly

was decided a mere 48 days prior to the events in question,[32]

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[32] While the Majority's analysis does not depend upon or even address this point, I do not believe the close temporal proximity between the decision in *Garner* and the events in question to be relevant or controlling. In a recent opinion, the Court of Appeals for the Sixth Circuit observed that while the circuits "have struggled to decide how long after a decision state officials have to become familiar with 'the law,' ... no rule has emerged." *Linz v. Skipski, 25 F.3d 304, 306 (6th Cir. 1994).* That court went on to hold that a "rule of reason" should apply in each case with respect to official compliance with new decisions. *Id.* I believe it to be not only reasonable, but legally correct, that once the Supreme Curt has announced a decision which governs the behavior of government or society, unless the Court states otherwise, it's holding becomes the law of the land when the judgment is entered and is binding upon those affected by it. We have, in effect, acknowledged this in *Good v. Dauphin County Social Services, 891 F.2d 1087, 1092 (3d Cir. 1989)* (stating that the ultimate issue in the "clearly established law" inquiry is whether, despite the absence of a case applying established principles to the same facts, "reasonable officials in the defendants' position at the relevant time could have believed, *in light of what was in the decided case law,* that their conduct would be lawful") (emphasis supplied). Moreover, and perhaps more important, as the district court noted, the decision in *Tennessee v. Garner* in significant respects mirrored, and in fact relied in part upon, section 508 of the Pennsylvania Criminal Code with respect to a peace officer's use of force in making an arrest. *See in re City of Philadelphia Litigation, 849 F.Supp. 331, 336 (E.D.Pa. 1994).* Thus, *Garner* hardly represented a novel twist in the law governing the defendants' actions: that law was already on the books. In fact, it would appear that section 508 squarely covered the actions taken by the defendants here. *See 18 Pa.C.S. §508* (providing that a peace officer is justified in using deadly force "only when he [or she] believes that such force is necessary to prevent death or serious bodily injury to himself or ... other[s] ... or when he [or she] believes both that: (1) such force is necessary to prevent the arrest from being defeated by resistance or escape; and (2) the person to be arrested has committed or attempted to commit a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he [or she] will endanger human life or inflict

the Supreme Court held that where an arresting officer has probable cause to believe that the suspect poses a threat of death or serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. *Garner, 471 U.S. at 11, 105 S.Ct. at 1701.*

> Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he [or she] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11-12, 105 S.Ct. at 1701.

In concluding that *Garner* bears an insufficient factual correspondence to be deemed the "clearly established law" applicable to this case, the majority runs counter to our traditional broad application of *Harlow v. Fitzgerald's* "clearly established law" standard. *See, e.g., People of Three Mile Island v. Nuclear Reg. Com'rs, 747 F.2d 139, 144-45 (3d Cir. 1984); Stoneking v. Bradford Area School District, 882 F.2d 720, 726 (3d Cir. 1989).* Although we have recognized that we cannot expect executive officials to anticipate the evolution of constitutional law, we do demand that they apply general, well-developed legal principles in analogous factual settings, *i.e.*, in settings bearing some, but not necessarily precise, factual correlation to the applicable precedent. *See People of Three Mile Island, 747 F.2d at 144.*

Yet the situation we face here is *identical* to the situation the Supreme Court confronted in *Garner:* a case of

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or otherwise indicates that he [or she] will endanger human life or inflict serious bodily injury unless arrested without delay").

police use of deadly force in carrying out a seizure of a person or persons actively resisting arrest. Even in their particulars, *Garner* and our case are compellingly analogous. Obviously, this case involves the use of deadly force against a group of armed and dangerous adults barricaded inside a house, while *Garner* involved the use of deadly force against an unarmed teenager who was running from the police. However, it bears emphasizing that in our case several hours had elapsed between the cessation of gunfire from within the MOVE dwelling and the dropping of the incendiary device by the police. Like *Garner*, the police simply were not facing a "shoot or be shot" (or a "drop bomb or be shot") situation at the moment the bomb was dropped. Indeed, this case is easier than *Garner*. In *Garner*, the Court determined that seizure by deadly force of a fleeing suspect was not worth the costs: it was better to let the suspect escape. *Garner, 471 U.S. at 11, 105 S.Ct. at 1701.* In our case, the suspects were not even fleeing. At the time the destructive device was deployed, the MOVE contingent (including several children) was not only barricaded inside a house, but was also surrounded and greatly outnumbered by well-equipped law enforcement personnel. Thus, unlike *Garner*, escape here was not even a reasonable or realistic possibility. As the Curt in *Garner* recognized, "[i]f subsequent arrest [is] assured, no one would argue the use of deadly force was justified." *Garner, 471 U.S. at 9 n. 8, 105 S.Ct. at 1700 n. 8.*

Based upon these considerations, I would hold that reasonable officials in the defendants' position at the relevant time could not have believed, in light of *Garner*, that their conduct would be lawful.

Even where the officials in question should have been aware of the "clearly established" governing law, we have explained that executive officials are still entitled to qualified immunity "if based on the information available to them they could have believed their conduct would be consistent" with

that clearly established law. *See Good, 891 F.2d at 1092.* However, I believe it would have been readily apparent to any reasonable official who possessed the same information as did the individual defendants on May 13, 1985, that at the time the explosive device was dropped, deadly force was not necessary to prevent the escape of the occupants of 6221 Osage Avenue.

Support for the counter-argument, so far as I can gather, is summed up by the majority in the following factors: (1) nightfall would render securing the neighborhood too difficult; (2) fatigue was setting in among the police personnel who had been on duty since the night before; and (3) certain members of the police appear to have believed that tunnels had been dug from the basement of the MOVE house. *See Maj.Op. at 950.* With respect to the nightfall factor, the entire block, including 6221 Osage Avenue, could have been illuminated artificially as are highway projects regularly. One can counter that these lights could then have been shot out by MOVE members. But I think a modicum of police ingenuity could have seen to it that the lights were placed at angles rendering them unsusceptible to gunfire. With respect to police fatigue, this, one presumes, could reasonably have been counteracted by the replacement of tired officers with fresh personnel.

And finally, with regard to the rumored tunnels, support in the record for a reasonable belief in the existence of escape tunnels is flimsy at best. The majority suggests that the defendants believed that MOVE members might have eluded capture through escape tunnels rumored to have been dug under the neighborhood. I would agree that had the defendants *reasonably* believed that MOVE had constructed escape tunnels underneath the neighborhood, the dropping of an explosive device might reasonably have been perceived as necessary to prevent the escape of the MOVE members under cover of the coming night. However, the record as I read it

does not support the view that the defendants actually believed that MOVE had constructed escape tunnels under the neighborhood; at most, it merely suggests a belief, based upon a statement that fifteen bushels of dirt had been deposited by MOVE members on a curb for disposal, that the MOVE members *might* have dug a tunnel to a neighboring house. First of all, digging an escape tunnel to a neighboring house is different from digging an escape tunnel "under the neighborhood" to some unknown outlet. But more importantly, even if the record supported the existence of such a belief, I would have no difficulty in concluding that it was unreasonable, indeed, far-fetched, in light of the evidence before us. It is fantasy to believe that fifteen bushels of dirt, even to a neighboring house, an escape tunnel makes.

Thus, I would hold that the individual defendants are not entitled to qualified immunity even when the factual information available to them on May 13, 1985, is taken into consideration.

IV.

Since I would hold that none of the individual defendants are entitled to qualified immunity in relation to the section 1983 claims against them, I would reverse the grant of summary judgment in favor of Goode, Powell and Klein as to the state law claims against these defendants.

V.

Judge Greenberg observes that in reaching my conclusion that the individual defendants used excessive force, I offer "no explanation of what alternatives were available," and am [a]pparently ... willing to have mandated an indefinite standoff." *See Maj.Op. at 967 n. 23.* This is in part true and largely irrelevant. It is certainly true that I am willing to "mandate" that which is reasonable and lawful. An

"indefinite standoff," among other options, qualifies. But it is not our primary purpose here to provide alternatives to unlawful police action. Instead, we are to evaluate the lawfulness of what *did* occur on May 13, 1985. We should only countenance the *lawful* resolution of that unfortunate incident. Thus, the larger point here is that Judge Greenberg, and to a lesser extent, Judge Scirica and I simply disagree, based upon our understanding of the record and the law, as to whether the dropping of the incendiary device was lawful.

In concluding that the defendant officials in this case used excessive force, I do not mean to imply that situations law enforcement officers confront daily are not fraught with difficulty and do not frequently require split-second decisions involving matters of life and death. To the contrary, law enforcement officers are forced to digest a steady diet of some of the most impossible choices under some of the most pressing circumstances and unforgiving conditions. We should, f course, be concerned for and sensitive to their fundamental mission, which is to ensure the protection and preservation of society.

But this, too, must be said: it is hardly debatable in a civilized constitutional democracy that in the final analysis, the goal of the enforcement of law, and thus, the maintenance of public order, is not promoted through the use of deadly force in effecting seizures. As the Supreme Curt has observed, the use of deadly force, in fact, frustrates the interest in enforcement of law through fair and objective judicial determination of guilt and punishment. *Garner, 471 U.S. at 9, 105 S.Ct. at 1700.* It is partly because the use of deadly force "is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion" that the Constitution, as interpreted by the Supreme Court, so narrowly circumscribes its use. *See Garner, 471 U.s. at 10, 105 S.Ct. at 1700.*

The majority in Part VII states that "courts must recognize that in certain instances the civil authorities are required to take strong steps to enforce the law and maintain public order[,]" and that "[t]he Constitution does not preclude these steps." *Maj.Op. at 972.* The danger inherent in this statement, which the majority appears to adopt as a precept of constitutional jurisprudence, lies in its breadth. I am deeply troubled by the necessary implication of the majority's statement, which is that the Constitution does not preclude that which is perceived as necessary or expedient to enforce the law and maintain public order. I hold a different view. I believe it to be beyond dispute that the Constitution precludes many acts which might, even reasonably, be deemed "necessary" for the enforcement of law and the maintenance of order. In determining what it does and does not preclude, we cannot engraft upon the Constitution our own predilections as to what that document, as a matter of perceived social necessity, ought or ought not permit law enforcement officials to do in the name of law and order.

CONCLUSION

For the above reasons, I respectfully concur and dissent.

Appendix Exhibit 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1277, 94-1278, 94-1280,
94-1322 and 94-1377

IN RE: CITY OF PHILADELPHIA LITIGATION
(D.C. Civil Action No. 84-2745)

RAMONA AFRICA
v.
CITY OF PHILADELPHIA; WILLIE GOODE; LEO A. BROOKS; GREGORE SAMBOR; WILLIAM C. RICHMOND; FRANK POWELL, LT.; WILLIAM KLEIN, OFFICER; MICHAEL TURSI, OFFICER; ALBERT REVEL, SGT.; EDWARD CONNOR, SGT.; MORRIS DEMSKO, CORPORAL; RICHARD REED, STATE TROOPER, Individually and in their present and/or former official capacities

(D.C. Civil No. 87-2678)

Leo A. Brooks,
Appellant in No. 94-1277

Ramona Africa,
Appellant in No. 94-1322

City of Philadelphia,
Appellant in Nos. 94-1280 and 94-1377

William C. Richmond,
Appellant in No. 94-1279

Gregore Sambor,
Appellant in No. 94-1278

Nos. 94-1233, 94-1272, 94-1276,

94-1321 and 94-1378

IN RE: CITY OF PHILADELPHIA LITIGATION
(Civil No. 85-2745)

ALFONSO LEAPHART, Administrator of the Estate of VINCENT LOPEZ LEAPHART, a/k/a JOHN AFRICA

v.

CITY OF PHILADELPHIA; W. WILSON GOODE, Mayor, City of Philadelphia; LEO A. BROOKS, Former Managing Director, City of Philadelphia; GREGORE J. SAMBOR, Former Police Commissioner, City of Philadelphia; WILLIAM C. RICHMOND, Fire Commissioner, City of Philadelphia; FRANK POWELL; WILLIAM KLEIN; MICHAEL TURSI; ALBERT REVEL; COMMONWEALTH OF PENNSYLVANIA; RICHARD THORNBURGH, Former Governor, Commonwealth of Pennsylvania; JAY CONCHRAN, Commissioner of State Police, Commonwealth of Pennsylvania; RICHARD REED; MORRIS DEMSKO; E.I. DUPONT DE NEMOURS AND COMPANY

(D.C. Civil No. 87-2756)

Alfonso Leaphart, Administrator of the Estate of Vincent Lopez Leaphart, a/k/a John Africa,
Appellant in No. 94-1321

City of Philadelphia,
Appellant in Nos. 94-1378, 94-1233, and 94-1272

William C. Richmond,
Appellant in No. 94-1276

Nos. 94-1229, 94-1230, 94-1231, 94-1232, 94-1320
and 94-1379

IN RE: CITY OF PHILADELPHIA LITIGATION
(D.C.Civil No. 85-2745)

LOUISE JAMES
v.
FRANK POWELL; GREGORE J. SAMBOR; LEO BROOKS; WILLIAM C. RICHMOND; W.WILSON GOODE; CITY OF PHILADELPHIA; STATE OF PENNSYLVANIA; DU PONT DE NENOURS, E.I. & COMPANY
v.
RAMONA JOHNSON AFRICA; ALPHONSO ROBBINS AFRICA,
Third-Party Defendants
(D.C. Civil No. 85-3528)

Louise James, Administratrix of the Estate of Frank James
Appellant in No. 94-1320

City of Philadelphia,
Appellant in Nos. 94-1229 and 94-1379

Gregore Sambor,
Appellant in No. 94-1230

Leo A. Brooks,
Appellant in No. 94-1231
William C. Richmond,

Appellant in No. 94-1232

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Nos. 85-02745, 85-03528, 87-02678, 87-02756)

Nos. 94-1277, 94-1278, 94-1279, 94-1280, 94-1322, 94-1377, 94-1233, 94-1272, 94-1276, 94-1321, 94-1378, 94-1229, 94-1230, 94-1231, 94-1232, 94-1320, and 94-1379

Present: Greenberg, Scirica, and Lewis, Circuit Judges

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on November 3, 1994.

The judgments of the said District Court entered January 5, 1994, February 1, 1994, and February 2, 1994 are considered.

It is now here ordered and adjudged by this Court that the judgment of said District Court is hereby affirmed insofar as it granted summary judgment with respect to all claims in favor of defendants Wilson Goode, and police officers Frank Powell and William Klein.

The judgment is reversed insofar as it denied summary judgment on all federal claims to defendants Leo A. Brooks, Gregore Sambor, and William C. Richmond and on remand the District Court should enter summary judgment in their favor on those claims.

The judgment of said District Court is affirmed insofar as it denied summary judgment to the City of Philadelphia on

the section 1983 claims based on letting the fire burn, but on remand the District Court shall consider the claims against the City in accordance with the reasonableness standard set forth in this Court's opinion.

Pursuant to this Court's findings that it lacks jurisdiction over the appeals regarding the District Court's denial of summary judgment for defendants Brooks, Sambor, and Richmond on the state law claims, those appeals are dismissed for lack of jurisdiction.

Pursuant to this Court's finding that it lacks jurisdiction over the appeal from the District Court's dismissal of the claim by Louise James seeking compensation for the destruction of her property, the appeal of Louise James is dismissed for lack of jurisdiction.

These causes are remanded for further proceedings consistent with the opinion of this Court for disposition of the remaining claims.

Each party is to bear their own costs in each appeal.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Clerk

Dated: March 6, 1995

Appendix Exhibit 4

In re City of Philadelphia.
Louise JAMES, Administratrix of the Estate of Frank James
v.
CITY OF PHILADELPHIA, et al.
Alfonso LEAPHART, Administrator of the Estate of Vincent Leaphart
v.
CITY OF PHILADELPHIA, et al.

Civ. A. Nos. 85-2745, 85-3528, 87-2756.

United States District Court, E.D. Pennsylvania.

Feb. 1, 1994.

Alvin F. de Levie, Donald M. Temple, Philadelphia, Pa., for plaintiffs.

Thomas R. Kline, Philadelphia, Pa.

Ramona Johnson Africa, pro se.

Michael A. Fenasci, New Orleans, La., for Zelma Dotson Harrigan, Claire Leak.

Anthony D. Jackson, A. Remy Fransen, Jr., Philadelphia, Pa. for Thomas Mapp, Sr.

Laura Fredricks, John O.J. Shellenberger, Office of Atty. Gen., Philadelphia, Pa., for Richard L. Reed and Morris Demsko.

Bruce M. Rotfeld, Rotfeld & Rotfeld, Philadelphia,

Pa., for Nathaniel Galloway.

Theodore G. Otto, III, Chief Counsel, Pennsylvania Dept. of Corrections, Camp Hill, Pa., for Department of Corrections.

Seymour Kurland, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for Ramona Johnson Africa.

Joseph Torregrossa, Morgan, Lewis & Bockius, Philadelphia, Pa., for Alfonso Robbins Africa.

Carl Oxholm, Philadelphia, Pa., for Edward Rendell, Albert Revel, Michael Tursi, William Klein.

Thomas A. sprague, Peter L. Gallagher, Philadelphia, Pa., for Claire Leak.

Peter C. Kennedy, Hecker, Brown, Sherry & Johnson, Philadelphia, Pa., for William Richmond.

Leslie M. Gerstein, Fox, Rothschild, O'Brien & Frankel, Philadelphia, Pa., for Leo A. Brooks.

Arlene F. Bell, E. Jane Hix, Chief, Asst. City Solicitor, Law Dept., Philadelphia, Pa., City of Philadelphia, Willie Goode, Leo A. Brooks, George Sambor, William Richmond, Richard Reed.

Lloyd George Parry, Darvis, Riter, Parry & Hartmann, Philadelphia, Pa., for Michael Tursi.

Robert J. Marano, Law Offices of Edward J. Wilbraham, Philadelphia, Pa., for Albert Revel.

Gerard Lavery Leuerer, Peter L. Gallagher, Philadelphia, Pa., Michael A. Fenasci, Gretna, La., Fincourt

B. Shelton, Philadelphia, Pa., for Louise James.

Barbara W. Mather, City solicitor, Carl Oxholm, III, Divisional Deputy City Solicitor, Philadelphia City Solicitor's Office, Philadelphia, Pa., for Frank Powell, Gregore J. Sambor, Leo Brooks, William Richman, W. Wilson Goode, and the City of Philadelphia, in No. 85-3528.

Alpphonso Robbins Africa, in pro per. AT1Rosemarie Rhoades, Ronald J. Harper, Andrea B. Paul, Philadelphia, Pa., for Alfonso Leaphart.

Arlene F. Bell, Debora M. Russo, Asst. City Sol., Philadelphia, Pa., for defendants in No. 87-2756.

Richard D. Malmed, Philadelphia, Pa., for Frank Powell in No. 87-2756.

LOUIS H. POLLAK, District Judge.

THE COURT: Good morning.

MS. HIX: Good morning, Your Honor.

MS. RHODES: Good morning, Your Honor.

MR. SHELTON: Good morning, Your Honor.

MR. ATKINSON: Good morning, Your Honor.

THE COURT: Please sit down, won't you. I want to congratulate this hearty bank of lawyers that managed to struggle in this morning. I know that Ms. Hix was here, I would judge, at about 6:00; very early indeed.

MS. HIX: I spent the night.

MR. SHELTON: If Your Honor pleases, last evening you had indicated that you would do Louise James first. However, I've arranged to be called at the end of the list and my coun--co-counsel here has--

MS. RHODES: A time problem.

THE COURT: Oh.

MR. SHELTON:--with the Superior Court, so I will yield.

MS. RHODES: I have to be in Superior Court at 9:30 instead of 10:00--

THE COURT: Oh my goodness.

MS. RHODES:--as I originally thought.

THE COURT: All right. Well, let's address your case first, Ms. Rhodes. Thank you, Mr. Shelton, for deferring to Ms. Rhodes. So we will consider the Leaphart case. The decision yesterday announced in the Ramona Africa case addresses a number of the issues that are central to both the Leaphart and James cases. And I will try to spare you a repetition of the, I'm afraid, somewhat extended analysis that I went through yesterday to the extent that the problems are overlapping.

In the Leaphart case, suit is brought by Alfonso Leaphart on behalf of the late John Africa whose name was also Vincent Lopez Leaphart. John Africa perished in the blaze at 6221 Osage. The defendants who are still in this case at this stage are former Mayor Goode, former Commissioner Richmond of the Fire Department, Lieutenant Powell of the Police Department, Officer Klein of the Police Department and Officers Tursi and Revel also of the Police Department. There

were other defendants who have, for a variety of reasons, been dismissed at earlier stages, including significantly the former Managing Director Leo Brooks, and the former Police Commissioner Gregore Sambor. Proper service was not effectuated as against them, so they have been dismissed, albeit without prejudice. So, though their activities figure in this case, that is, Director Brooks and Commissioner Sambor, they are not parties to the case. And the City of Philadelphia is, of course, also a defendant.

Now, with respect to defendants Revel and Tursi, they have been the subject of a previous order of dismissal in the Ramona Africa case. The claims in this case substantially replicate the claims in the Ramona Africa case. And for the reasons that dismissal was called for with respect to Tursi and Revel in the Ramona Africa case, summary judgment is granted with respect to them as well here. And that was recommended in recommendation one of Magistrate Judge William F. Hall, Jr.'s Report and Recommendation and will be sustained.

The next issue to be examined is the assertion of liability under Section 1983 for dropping the bomb. And with Messrs. Revel and Tursi dismissed with respect to all claims, the focal question with respect to dropping the bomb is the claim of immunity advanced on behalf of Mayor Goode and Lieutenant Powell and Officer Klein and also Commissioner Richmond. Commissioner Richmond evidently had no participation in the plan to drop the bomb so he is entitled, in any event, to substantive dismissal. But with respect to the claims of immunity for the reasons explained yesterday, immunity is conferred with respect to those claims as to all of the defendants. And that means that that issue drops out of the case and summary judgment is sustained as recommended by Judge Hall for the City and for Messrs. Goode, Klein, Powell and Richmond. That is reflected variously in Judge Hall's recommendations at two, four and eight.

With respect to the decision to let the fire burn, Judge Hall characterized that as a different matter from the dropping of the bomb. As I explained yesterday, I also conclude that, for the purposes of our case, that is indeed a different matter. And I conclude that there is no immunity from--with respect to the charges, which are also Section 1983 charges, for those participating in the decision to let the fire burn at all. That--however, though that was a decision that was taken by Commissioner Richmond together with Commissioner Sambor and perhaps involving Managing Director Brooks, as noted in my discussion yesterday of the Ramona Africa case, whether Mr. Brooks was involved or not is, of course, highly disputed; but I concluded yesterday that there was enough of an evidentiary basis for attributing a role in that decision so that Mr. Brooks should stay in the case.

Of these persons, only Commissioner Richmond is a party to this case. So summary judgment will be denied with respect to Commissioner Richmond. That claim will proceed against him and also against the City. And I won't repeat my discussion of yesterday with respect to the City's claims of immunity; but in this instance, suffice it to say they fail because of the acknowledged involvement of Commissioner Richmond who had final decisional authority with respect to the Fire Department until that was ultimately superseded on the Mayor's direction and perhaps also independently on Managing Director Brooks' direction. And the City also loses its immunity because, as I pointed out yesterday, managing Director Brooks' attributed responsibility involves another level of--an even higher level of municipal decisional responsibility. If the claims of General Brooks' involvement are credited by the jury, then evidently General Brooks would have concurred in the decision of Commissioners Richmond and Sambor perhaps at the very time they made it, certainly not very long thereafter.

Summary judgment will be granted with respect to the

letting-the-fire-burn claim for the other defendants, Powell, Klein and, of course, Mayor Goode, and this is dealt with in Judge Hall's second recommendation.

Now, as to the other federal claims, for reasons addressed yesterday, and which will not be repeated today, I find no basis for claims arising under Section 1985(3) with respect to any of the defendants and that is canvassed in Judge Hall's first, second and third recommendations. Judge Hall is quite correct on that. Judge Hall supposed that there had not been a challenge to the claims of Mr. Leaphart under the first and fifth and fourteenth amendments, including the claims of familial association. It appears that, indeed, that the defendants had challenged those claims and took appropriate exception to the ruling--recommended ruling on that. Evidently, there was some confusion as to just what claims had been asserted at what stage and what challenges had been asserted to those claims at what stage. At all events, I conclude that summary judgment, with respect to all of the defendants, should properly be granted with respect to those claims, as well as the 1985(3) claims.

The City is correct in contending that with respect to the surviving federal claim against it--the 1983 claim which it believes it should have immunity for and which I have concluded that it does not have immunity for--the City is, in any event, correct that punitive damages are not assertable against the City, and so--as Judge Hall recommended--that claim will be dismissed. However, punitive damages are assertable against Commissioner Richmond in thee event that there is--that the jury finds that there is sufficient evidence of egregiousness with respect to Commissioner Richmond's role in the decision to let the fire burn so as to warrant punitive damages. I cannot, at this time, conclude as a matter of law that a punitive damage claim is not assertable, though I point out, of course, that that is a very, very difficult kind of a claim to sustain. But it may be that there will be enough to go to the

jury on that issue. At least I will not rule it out now.

With respect to the state law claims: Judge Hall, in recommendation seven, recommended that Commissioner Richmond's motion for summary judgment should be granted with respect to the state law claims. I think that was simply a typographical misstatement inasmuch as on page 12 of his Recommendation and Report Judge Hall recites that Commissioner Richmond "is not entitled to summary judgment with respect to the plaintiff's pending state claims based on the provisions of the PSTCA." I think Judge Hall's recital on page 12 is correct, and--so I conclude that Commissioner Richmond is suable on the pendent state law claims. The City, however, is entitled to immunity with respect to the state law claims for reasons discussed yesterday resulting from the Pennsylvania Supreme Court's November decision in the Gray case.

That, according to my understanding, completes the recital as to the results in the Leaphart litigation. And I will enter a written order which recites these various rulings. And I do hope, Ms. Rhodes, that you can make it quickly to the Superior Court.

MS. RHODES: Thank you, Your Honor.

THE COURT: Thank you for coming in so promptly and, while maintaining all neutrality I possibly can, I hope you prevail in Superior Court.

MS. RHODES: Thank you.

THE COURT: I hope your adversary also prevails. Would you like us to call anybody over there or will you--

MS. RHODES: No, I can make it.

THE COURT: All right. Thank you, Ms. Rhodes, good to see you. Now let me turn to the James case. In the James case, the claims again are very similar to those found in the Ramona Africa case and the Leaphart case with one qualification--that Mrs. James sues not only in her capacity as administratrix of the estate of her son, Frank James or Frank Africa, she also sues in her capacity as owner of 6221 Osage. And in that capacity, she asserts a federal claim under the fifth amendment for the alleged confiscation of her property through its uncompensated destruction.

The rulings discussed in the Ramona Africa case and repeated in connection with the Leaphart case also govern much of the James case. The central claim is one arising under Section 1983 for excessive force used in the bombing and then the ensuing decision to let the fire burn. there is a--there are two further federal claims, one under Section 1985(3) and one under--I'm sorry, that may be the only other federal claim. I guess there is not, in this case, a first amendment claim such as was asserted in--on behalf of Ms. Africa and Mr. Leaphart.

With respect to the 1985(3) claim, that fails, for reasons discussed amply by Judge Hall in his Report and Recommendation on Ramona Africa's case and to which I referred yesterday. Basically, such a claim can be sustained only where there is evidence of a conspiracy to deprive one of the equal protection of the laws where the deprivation is allegedly based on some racial or other class-based animus and there is no evidentiary support in any of these three cases for such a claim. So Judge Hall was correct, in my judgment, in rejecting those claims.

With respect to the 1983 claim, the same analysis that governed my decision in the Ramona Africa case governs here. I conclude that the claims based on the dropping of the bomb, as such, are claims with respect to which the charged

defendants have immunity, but not so with respect to those defendants with respect to whom there may be some evidentiary basis for attributing participation in the ensuing decision to let the fire burn. Let me say, parenthetically in this case, that the argument that was asserted on December 28th that there was no basis for finding that the fire was connected to--caused by--the dropping of the bomb, was an argument that, I think, was wholly unmeritorious. In Judge Hall's extended Report and Recommendation in the Ramona Africa case, he points, at page eight, to the acknowledgment by the defendants, in paragraph 96 of the defendant's answer in Exhibit I that "the office of the fire marshall [had] issued a report concluding that the fire was caused by the mechanical ignition of combustible liquid vapor occurring as a result of detonation." I point out that causational nexus simply because at the trial of these cases, although no liability can attach with respect to the dropping of the bomb itself, as distinct from the decision to let the fire burn, it will, of course, be open to the plaintiffs in the several cases to bring before the jury the full picture of what events were antecedent to the decision to let the fire burn, including the bombing. And that factual predicate and the causal nexus between the impact of the explosive device and the ensuring fire will, of course, be before the jury and will be part of what they will have to consider in determining whether the decision to let the fire burn from the moment it was detected was a constitutionally defensible one.

The defendants in this case are Mayor Goode, the two Commissioners, Sambor and Richmond, Managing Director Brooks, and Lt. Powell and the City of Philadelphia. It follows, from previous discussion under the Ramona Africa and Leaphart cases, that the recommended rulings by Judge Hall should be dealt with as follows: With respect to Judge Hall's first recommendation, Judge Hall is correct in recommending summary judgment in favor of Mayor Goode and Lt. Powell with respect to the 1983 excessive force claim,

the 1985(3) claim and the state law claims. I will refer later to the just compensation claim which should be focused on separately. However, for the reasons I discussed yesterday in connection with the Ramona Africa case, General Brooks will not be dismissed from the case at this stage. There is an evidentiary basis for attributing to him participation in the decision to let the fire burn. So though he is entitled to summary judgment with respect to the first portion of the excessive force claim, the dropping of the bomb, just as Lt. Powell and Mayor Goode are, he is not entitled to summary judgment with respect to the second part of the excessive force claim, the letting-the-fire-burn claim. And Mayor Goode is entitled to immunity with respect to that claim since there's no basis for attributing to him any participation in the decision to let the fire burn. And Lt. Powell had no rule in that decision, so he drops out of that aspect of the claim as well.

Judge Hall is, in my judgment, correct in his subsequent recommendations--two, three, four, five, six, seven and eight--and I won't undertake to recite what is already stated there. Suffice it to say that, in summary, Commissioners Richmond and Sambor are entitled to summary judgment with respect to the first part of the excessive force claim, but not with respect to the second part, that resulting from the decision to let the fire burn. And the City of Philadelphia is also entitled to summary judgment with respect to the 1985(3) claim, the state law claims and the decision to drop the bomb. But the City of Philadelphia is not immune from suability--potential liability--with respect to the claim for letting the fire burn.

The order that I will enter will make it plain that Managing Director Brooks will remain a defendant with respect to the 1983 excessive force claim involving the decision to let the fire burn and, for that reason, will also remain, in parity with Commissioner Richmond and Commissioner Sambor, a defendant on the state law claims.

Now, the one matter which threads its way through certain of Judge Hall's recommendations that I have not addressed and that I said that I wanted to address separately is the question of Ms. James' assertion of a fifth amendment claim with respect to the destruction of her house. Judge Hall explained in his Report and Recommendation that Ms. James has sought "to create a federal civil rights action from the loss of her property." What Magistrate Judge Hall concluded was that, under the authority of Williamson County Planning Commission v. Hamilton Bank, a Supreme Court decision of 1985, 473 US 172, there cannot be asserted a fifth amendment claim until the--until, as Judge Hall put it--"the claimant has first resorted to state procedures for remedying the loss." Judge Hall notes that the state provides procedures under the Pennsylvania eminent domain code in which property owners can seek just compensation for the destruction by governmental action of their property. And Judge Hall comes to the conclusion that because Ms. James did not allege that she pursued that remedy, she is not in a position to bring this fifth amendment claim in this lawsuit.

The exceptions taken by Ms. James focus on the contention that indeed Ms. James did seek recovery with respect to those losses, and that that is clearly manifest in litigation that ultimately was dismissed by this court in 1988. The reference there is to an order of December 20, 1988 entered by me in the case of Louise James v. City of Philadelphia, et al., civil action # 88-3881. On December 20, 1988 I entered an order as follows:

> for the reasons stated in a bench opinion delivered on December 14, 1988 after oral argument, defendant's motion to dismiss is granted. Plaintiff's federal claims against all defendants, including non-moving defendants, are hereby dismissed with prejudice as barred by the applicable statute of limitations. In view of the dismissal of the federal claims, plaintiff's

pending state law claims are also dismissed but without prejudice.

Ms. James takes exception to Judge Hall's recommended disposition. those exceptions do not, because indeed they really cannot, take issue with Judge Hall's claim that with respect to the present litigation now before the court, the fifth amendment claim is defective without an appropriate allegation of unsuccessful resort to state procedures pursuant to Pennsylvania's eminent domain code. Ms. james, in effect, seeks to substitute for that requirement the fact that she brought a lawsuit asserting a federal claim arising out of the contention that she was offered compensation for her house pursuant to the general city program of compensation and the rebuilding of the destroyed houses, but that offer to her was withdrawn a few days later pursuant to a letter from the city official in charge who said that the offer had been tendered inadvertently. The basic thrust of the claim dismissed in 1988 was that Ms. James' treatment, in that respect, as allegedly the only person in the neighborhood of destroyed houses or damaged houses who was not offered to be compensated or for whom there was any revocation of an outstanding offer, was discriminatory in terms that were unconstitutional. However that may be with respect to the merits of the claim, as noted, my order of dismissal on December 20, 1988 was on statute of limitations grounds.

Ms. James today asks either that I disregard Judge Hall's recommendation for dismissal of the fifth amendment claim in the case now before the court, or that I, nunc pro tunc, reopen the 1988 case which Ms. James contends was erroneously decided. Neither request seems to me appropriate. Judge Hall's decision was appropriate for the reasons he gave with respect to the case that is now before the court, so I have no reason to disturb his recommendation. The proposal that I now reopen a case dismissed by me a little more than five years ago seems to me unpersuasive. If there was error in my

dismissal on statute of limitations grounds, that error was assertable on appeal. And as to that, my recollection, and I may be wrong on this, is that I was advised by Mr. Shelton that there was, indeed, an appeal. That is correct, is it not?

MR. SHELTON: That is correct. The appeal was lost.

THE COURT: That there was an appeal to the Third Circuit and my ruling was not disturbed. I don't know that there was an attempt to seek certiorari on that issue, I haven't been advised of any. I assume--am I right, Mr. Shelton, that there was not?

MR. SHELTON: There was no further appeal from Superior Court.

THE COURT: Yes. So what one has is a final judgment here sustained by the Court of Appeals, and I find no basis for revising that five year old determination: none has been offered and no newly discovered evidence, nothing that would suggest a basis for re-examination. So, I will deny the motion for a nunc pro tunc revision of the 1988 decision, and I will also sustain Judge Hall's recommendation that the fifth amendment claim be dismissed from the present litigation.

That completes my discussion of the James case, unless there are matters that counsel have on their minds that I may have missed with respect to the James case. I take it there was nothing on the Leaphart litigation and nothing was suggested before Ms. Rhodes' departure.

Let me simply say in closing, before I recess court, first, that I want to thank counsel, yourselves who are still here, and all the other counsel who attended on the 28th of December and yesterday. I want to thank you all for your

prompt and effective presentation of these issues to me so that we could reach a relatively expeditious disposition of the issues tendered by the several Reports and Recommendations of Judge Hall in these three inter-related cases. After so long a lapse of time, I was eager to bring these issues to disposition as promptly as possible so that these cases, in their slimmed-down state with numbers of defendants and claims eliminated, could now progress toward trial or towards non-trial disposition if settlements can be arrived at.

I would hope that counsel in all three cases would consult together very promptly with respect to the next stages in these cases. I think it may well be that what I will ask of counsel who are present here is that if, in addition to consulting with respect to the James case, you would also advise other counsel and generate, to the extent that there is overlap, consultation with respect to the Leaphart and Ramona Africa cases, and give me a report, well, let me say within two weeks' time as to what, if any, next steps counsel can agree upon with a view to moving these three cases forward. I appreciate that there may be appeals taken from some of the rulings that I have made. And if that be the case, then it would, of course, not augur prompt movement to trial. On the other hand, if appeals are not taken, at least at this stage in the rulings that have now been made, then I would hope that would lead us to a situation in which Ms. Bozzelli and I could set these matters down fairly promptly for trial. I mean, promptly given the extended canvas of these cases. And so I would like to hear from counsel within two weeks.

Ms. Hix, may I put on you the role of coordinating the assembling of counsel, whether in person or--I would hope in person, but if you prefer, of course, whatever mode you pursue, at least by phone--so that you could collectively then advise me as to what your thoughts are about next steps?

MS. HIX: Yes, Your Honor.

THE COURT: I ask you to take on this role, Ms. Hix, because you assuredly are occupying a pivotal role in all cases, and I'm sure all counsel will be cooperative.

Well, I will enter a written order in the James case as also with Leaphart and Ramona Africa, and I look forward to hearing from you all. Thank you very much for coming in this morning.

MR. ATKINSON: Thank you, Your Honor.

MR. SHELTON: Thank you, Judge.

MS. HIX: Thank you.

MEMORANDUM/ORDER

1. By letter dated January 10, 1994--a letter this court directs be filed and treated as a motion--counsel for defendant Goode requested, pursuant to Federal Rule of Civil Procedure 54(b), that this court's dismissal of all claims against defendant Goode in the order filed on January 5, 1994 be declared to be a final judgment in defendant Goode's favor.

2. By motion filed January 14, 1994, pursuant to Rule 59(e), City Defendants requested alteration or amendment of the January 5 order in the following respects:

(a) entry of final judgment, pursuant to Rule 54(b), in favor of defendants Powell and Goode; and

(b) a statement of this court's opinion that, within the meaning of 28 U.S.C. § 1292(b), this court's denial of summary judgment in favor of the City of Philadelphia, in Paragraph 9 of the January 5 order, "involves a controlling question of law as to which there is substantial ground for difference of opinion

and that an immediate appeal from the order may materially advance the ultimate termination of the litigation...."

3. On January 31, 1994, this court held a conference in court on the record to consider the foregoing motion and kindred motions filed in the cases consolidated herewith. At that conference, Deputy City Solicitor Hix, representing the City Defendants, advised the court that her request for the entry of final judgment, in this case and in the other cases, in favor of the several individual City Defendants was one in which counsel for those individual defendants concurred. Also, at that conference, Mr. Shelton (who participated by telephone), representing the plaintiff, advised the court that the plaintiff took no position with respect either to the Rule 54(b) request or to the § 1292(b) request.

4. At the conference, after hearing from counsel, the court stated that in its view the relief requested under Rule 54(b) and under § 1292(b) should be granted, albeit not by way of alteration or amendment of the January 5 order. Accordingly, it is hereby ORDERED:

A. There being no just reason for delay, the January 5 dismissals of all claims against defendants Powell and Goode shall pursuant to Rule 54(b) be declared final judgments, and it is HEREBY EXPRESSLY DIRECTED that final judgments shall be ENTERED in favor of defendants Powell and Goode on all claims.

B. It is DECLARED to be the opinion of this court that, within the intendment of 28 U.S.C. § 1292(b), (1) the issue, determined adversely to the City of Philadelphia in Paragraph 9 of the January 5 order, of the suability of the City of Philadelphia, pursuant to 42 U.S.C. § 1983, on claims arising from the decision to let the M.O.V.E. fire burn, is one which involves a controlling question of law as to which there

is substantial ground for difference of opinion, and (2) that an immediate appeal from that aspect of the January 5 order, taken in conjunction with anticipated appeals on related questions of the qualified immunity of certain individual defendants, may materially advance the ultimate termination of the litigation. More precisely, the question of the City's potential liability under cases such as *Monell v. City of New York Dep't of Social Services*, 436 U.S. 658 (1978), *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), and *St. Louis v. Propratnik*, 485 U.S. 112 (1988), appears to turn on whether, given the City's structure as defined in the Philadelphia Home Rule Charter, a decision made by the managing Director and/or the Police and Fire Commissioners is, for § 1983 purposes, a final municipal decision, or whether only the Mayor may make a final municipal decision. Resolution of this question may be affected by resolution of the questions whether the Managing Director, the Police Commissioner and the Fire Commissioner are entitled to qualified immunity with respect to their alleged participation in the decision to let the M.O.V.E. fire burn--questions determined adversely to the officials in the January 5 order.

FN* This is a transcript--slightly edited for clarity--of a bench opinion delivered by Judge Pollak on January 4, 1994.

Appendix Exhibit 5

In re CITY OF PHILADELPHIA LITIGATION.
Ramona AFRICA
v.
CITY OF PHILADELPHIA, et al.
Civ. A. No. 87-2678.
United States District Court,
E.D. Pennsylvania.
Jan. 25, 1994.

Thomas R. Kline, Alvin F. de Levie, Donald M. Temple (co-counsel), Philadelphia, PA, for plaintiffs.

Carl Oxholm III, Deputy City Sol., Philadelphia, PA, for Frank Powell, Fire Commissioner Wm. B. Richmond, W. Wilson Goode, Leo A. Brooks, Gregore Sambor, and the City of Philadelphia et al.

Gerard Lavery Leverer, Philadelphia, PA, for Louise James (third party deft.).

Michael A. Fenasci, New Orleans, LA, for Zelma Dotson Harrigan.

Michael A. Fenasci, A. Remy Fransen, Jr., New Orleans, LA, for Claire Leak and Louise James.

Anthony D. Jackson, Philadelphia, PA, for Thomas Mapp, Sr., et al.

Carl Oxholm, III, Divisional Deputy City Sol., Philadelphia, PA, for Edward Rendell.

Laura Fredricks, John O.J. Shellenberger, Office of Atty. Gen., Philadelphia, PA, for Richard L. Reed and Morris Demski.

Bruce M. Rotfeld, Rotfeld & Rotfeld, Philadelphia, PA, for Nathaniel Galloway.

Theodore G. Otto, III, Chief Counsel, Camp Hill, PA, for Department of Corrections.

Seymour Kurland, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, PA, for Ramona Johnson Africa.

Joseph Torregrossa, Morgan, Lewis & Bockius, Philadelphia, PA, for Alfonso Robbins Africa.

Carl Oxholm, Philadelphia, PA, for Albert Revel, Frank Powell, Michael Tursi and William Klein.

Michael A. Fenasci, Gretna, LA, Thomas A. Sprague, Peter L. Gallagher, Philadelphia, PA, for Claire Leak.

Peter C. Kennedy, Hecker, Brown, Sherry & Johnson, Philadelphia, PA, for William Richmond.

E. Jane Hix, Chief Asst. City Sol., Philadelphia, PA, for City of Philadelphia, Willie Goode, Leo A. Brooks, George Sambor, William Richmond and Richard Reed.

Lloyd George Parry, Davis, Riter, Parry & Hartmann, Philadelphia, PA, for Michael Tursi.

Leslie M. Gerstein, Fox, Rothschild, O'Brien & Frankel, Philadelphia, PA, for Leo A. Brooks.

Fincourt B. Shelton, Philadelphia, PA, for Louise James.

Robert J. Marano, Law Offices of Edward J. Wilbraham, Philadelphia, PA, for Albert Revel.

OPINION[1]

LOUIS H. POLLAK, District Judge.

What we have for consideration today are three cases growing out of the tragic events of May 13, 1985 in which, unhappily, as too many people in this city will recall, in an effort to arrest certain members of the MOVE organization, an explosive device was dropped on the MOVE residence at 6221 Osage Avenue. A fire ensued, and of the thirteen persons inside the MOVE dwelling on that late spring afternoon, only two, one child and one adult, survived. In addition to the destruction of that residence and eleven of the thirteen people within, there was a conflagration which consumed in substantial measure large numbers of adjacent homes.

Much litigation has ensued. The bulk of it was consolidated in this court under the master caption Number 85-2745. That was a repository for the papers and numerous lawsuits, some of them brought by or on behalf of those at 6221 Osage Avenue, the bulk of them brought by or on behalf of adjacent property owners, against a large array of official defendants charged in one manner or another with violating federal and state legal norms. The large bulk of these cases have been settled. The three which are to be addressed today have not been settled. They all grow directly out of the events at 6221 Osage Avenue. The three cases in the order of their filing are Louise James v. The City of Philadelphia, et al., Civil Action No. 85-3528, Ramona Africa v. The City of Philadelphia, et al., Civil Action No. 87-2678, and Alfonso Leaphart v. The City of Philadelphia, et al., Civil Action No. 87-2756.

In the James case, the plaintiff Louise James is suing

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1 This is a transcript-slightly edited for clarity-of a bench opinion delivered by Judge Pollak on January 3, 1994.

on behalf of her son Frank James, also known as Frank Africa, who perished in the conflagration at 6221 Osage, and she is also suing in her capacity as owner of 6221 Osage. Alfonso Leaphart sues on behalf of another person who died in the blaze, Vincent Leaphart, also known as John Africa. Ramona Africa, who is present here in this courtroom, is the one adult who survived the blaze. She sues the City of Philadelphia and many individual defendants. We will first consider Ms. Africa's case.

We consider her case, as we will in due course consider the cases of Ms. James and Mr. Leaphart, on the basis of the report and recommendation filed by my very distinguished former colleague Magistrate Judge William F. Hall, Jr. in October of 1993. I say, with regret, "former colleague" because as of December 31, 1993, Judge Hall's remarkable tenure as one of the important figures in the administration of justice in this district came to an end as he retired from office. Judge Hall has for many years contributed greatly to the vindication of the highest principles of the law, and his management of this extraordinary litigation, which has been consolidated under his supervision for these past many years, has been exemplary--but exemplary in the style of a judge who knows only excellence.

Ramona Africa's case, like its companion cases, precipitated years of discovery, of pretrial inquiry into the facts surrounding the events of May 13, 1985. After this extended period of discovery, the many defendants moved for summary judgment with respect to the several claims Ms. Africa presented. Her several claims may be briefly summarized as follows. There were three sets of federal claims, the first under Section 1983 of Title 42 in effect alleging that the assault on 6221 Osage violated her constitutional rights. Second, Ms. Africa alleged not only that she was physically assaulted by the bombing and the ensuing fire but that her First and Fourteenth Amendment rights to

freedom of speech and freedom of religion were trespassed upon by the defendants. And the third of her federal claims was an allegation, pursuant to 42 U.S.C. § 1985(3), of a conspiracy among the defendants to deprive her of her entitlement to equal treatment under the laws. In addition, Ms. Africa alleged claims arising under Pennsylvania law, claims which essentially mirror her claims of assault, of grossly disproportionate use of force against her in violation of Section 1983, the first and principal of the federal claims.

Those sued by Ms. Africa, in addition to the City of Philadelphia, numbered among them former Mayor Wilson Goode, former Managing Director Leo Brooks, former Police Commissioner Gregore Sambor, former Fire Commissioner William Richmond, former District Attorney Edward Rendell, Police Lieutenant Frank Powell, Officers William Klein, Michael Tursi, and Sergeants Albert Revel and Edward Connor of the Philadelphia Police Force, and finally Corporal Morris Demsko and State Trooper Richard Reed of the Pennsylvania State Police.

[1] The principal, though to be sure not the only, issues tendered by the motions for summary judgment were claims that the various defendants were protected from suit by doctrines of qualified immunity. In general, the doctrine of immunity provides that officials should be insulated from suits for torts arising out of their official activity and with which they are charged, provided that the allegedly tortious conduct is conduct which they could have reasonably supposed to have been lawful at the time committed. The purpose of doctrines of immunity, both absolute--and in one instance, one of the defendants asserted absolute immunity--and qualified immunity, the purpose of these doctrines is to make sure that public officials are able to carry out their duties without looking over their shoulder at every moment in fear that litigation may ensue from one or another action taken, purposefully and forcefully, to carry out their duties.

On March 3, 1992, Judge Hall issued a report and recommendation concluding that former District Attorney Rendell, who was charged by Ms. Africa with having authorized search and arrest warrants of MOVE members without probable cause, was immune from suit on that complaint. It was Judge Hall's view that making such a decision as to the appropriateness of the warrants was exactly within the scope of District Attorney Rendell's official functions and that he was cloaked with immunity in making such decisions. On December 8, 1992, I sustained Judge Hall's report and recommendation with respect to former District Attorney Rendell and entered an order dismissing him from this lawsuit, granting summary judgment in his favor. I did not adopt exactly the same rationale as that propounded by Judge Hall. I concluded that Mr. Rendell was entitled to qualified, not absolute, immunity in a context in which, so it seemed to me, he did have probable cause to issue the warrants in question.

On March 26, 1992, Judge Hall filed a report and recommendation which dealt with the claims of immunity of all of the other individual defendants and also the claim of the City of Philadelphia that it was exempt from suit. Judge Hall concluded that no immunity was owing to any of the defendants, with the exception of Officer Tursi and Sergeants Revel and Connor. Judge Hall reasoned that the responsibilities of those officers had to do with an attempt, which was abandoned, to drill holes into the walls adjacent to 6221 Osage with a view to injecting tear gas into 6221 in that fashion. When that tactic was unavailing, the decisions were taken at higher levels to proceed in the alternate fashion leading to the dropping of an explosive device to which I have referred. But since Officer Tursi and Sergeants Revel and Connor were not involved in those further decisions, Judge Hall concluded that they should be dropped from the case, and I approved their dismissal on August 18, 1992. However,

Judge Hall concluded as to the other defendants who were implicated, except for Fire Commissioner Richmond, in the development and execution of the plan to drop a bomb on 6221 Osage, that that was a decision that could not have reasonably been thought to be an appropriate law enforcement measure.

Just over a year ago, on December 8, 1992, 809 F.Supp. 375, I remanded this case to Judge Hall to reconsider it. I concluded that it was necessary to examine the case in the light of federal constitutional law as it stood on May 13, 1985, the day that the events sued on took place. In that connection, I pointed out that the United States Supreme Court, in the case of *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1, which was decided in March of 1985, just two months before the events at 6221 Osage, had formulated a rule of constitutional law construing the requirements of the Fourth Amendment as they applied to situations in which law enforcement officers were undertaking to deal with the flight of persons suspected of serious felonious conduct. The Supreme Court in *Tennessee v. Garner* had formulated a rule which for Pennsylvania peace officers could properly be regarded as effectively adopting the then prevailing provisions of Section 508 of the Pennsylvania Criminal Code.

What the Supreme Court said in *Tennessee v. Garner* was the following:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not

seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11-12, 105 S.Ct. at 1701.

I refer to Section 508 of the Pennsylvania Criminal Code. I do so because the Supreme Court in a footnote to its opinion in Tennessee v. Garner--an opinion by Justice White, recently retired--cited a number of state statutes embodying in a variety of verbal forms a rule approximating that adopted by the Supreme Court itself in *Tennessee v. Garner*. The Pennsylvania legislature had provided in Section 508 with respect to a peace officer's use of force in making an arrest--and here I quote only in relevant part:

(1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or

serious bodily injury to himself or such other person, or when he believes both that:

(1) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. § 508.

In remanding this case to Judge Hall in the light of the principles I have referred to, I said, "Therefore, the Court must determine on plaintiff's well-documented version of the facts whether a reasonable officer in each defendant's position, to the extent that this defendant could be found to have some responsibility for the use of force in question, could have believed that the force employed was necessary to protect the safety of himself or others." And I referred to a Third Circuit case [*Good v. Dauphin County Social Services,* 891 F.2d 1087, 1092, 1094-95 (3d Cir.1989)]. I went on, "If the answer to that question with respect to any of the defendants is in the affirmative, then summary judgment should be granted in his favor; by contrast, for those defendants to whom the answer is in the negative, summary judgment on qualified immunity grounds should be denied (though it may be raised anew once facts are further developed and explored at trial)."

Against that background, Judge Hall considered the case anew, and on October 6, 1993, he issued a new report and recommendation. In his new report, Judge Hall concluded that the dropping of the bomb could, notwithstanding the events that ensued, have been thought, at

the time of the decision to drop the bomb, to have been a reasonable device for accomplishing the purposes which the police officers were responsible for accomplishing."I conclude," said Judge Hall, "that a reasonable person in each of the defendant's positions could have believed that the use of an explosive device to remove the bunker from the roof and to provide access to the interior of the house for tear gas was necessary to 'prevent death or serious bodily injury' to the police officers on the scene or other persons. In addition, based on the information available to them regarding MOVE's threats of violence and MOVE's use of force in resisting arrest, they could have believed that the use of the bomb would be conduct that was consistent with the principles embodied in Section 508 and *Garner*."

In that connection, Judge Hall had before him a great deal of testimony about the course of planning which led to the decision to drop a bomb. There was, as I have indicated, an initial plan to attempt to gain access to 6221 Osage Avenue by breaching the walls and thereby introducing tear gas with a view to bringing those in the house outside. That plan turned out not to be feasible, and then there was developed the plan which Police Commissioner Sambor adopted--and got the agreement of Managing Director Brooks, who in turn got the agreement of the Mayor--to try the dropping of an explosive device with a view to (1) removing a bunker that had been built on the top of the house and which the fire department had been unsuccessful in removing by squirting very forceful streams of water on it during the day, and also (2) making a hole in the roof through which tear gas could be introduced. It was in that context that Judge Hall reached the legal conclusion that I have quoted.

In Judge Hall's analysis, he went on to consider what he found to be "a different matter," that is to say the decision, once the bomb had been dropped and fire ensued a number of minutes later, to let the fire continue to burn. It was Judge

Hall's conclusion that to permit the fire to burn after the bunker on top of the house had been essentially neutralized could no longer be regarded as in any sense a reasonable law enforcement purpose under the standards of Tennessee v. Garner and Pennsylvania Criminal Code Section 508. It was Judge Hall's conclusion that the decision to let the fire continue to burn was one made jointly by Police Commissioner Sambor and Fire Commissioner Richmond. It was Judge Hall's conclusion that there was no evidence that Managing Director Brooks acquiesced in this decision and no evidence that the Mayor acquiesced. Indeed, the decision to fight the fire was made by directive of Managing Director Brooks to Police Commissioner Sambor who in turn relayed that either to the Deputy Fire Commissioner or the Fire Commissioner himself. And Managing Director Brooks heard almost simultaneously from the Mayor and relayed to the Commissioners the Mayor's determination that the fire must not be permitted to go unfought, that it was time for the fire to be addressed directly. Unhappily, as we know, the efforts to fight the fire, once those efforts got underway, were unavailing for a very long time. And enormous devastation ensued, not only at 6221 itself, the rooftop of which apparently had gasoline in a drum or drums on top of it, but also in surrounding houses.

Judge Hall concluded therefore that the federal claims were entertainable as against Commissioners Sambor and Richmond since they had jointly made the decision not to fight the fire right away. But Judge Hall recommended that the federal claims not be pursued as against the Mayor and the Managing Director since they were, on Judge Hall's analysis of the facts, uninvolved in the decision to let the fire burn. Judge Hall concluded that the decisions of the Police Commissioner and Fire Commissioner to let the fire burn for a time were decisions which in turn entitled Ms. Africa to sue the City of Philadelphia. The argument against suit against the City is essentially this, and it was this that the City pressed

vigorously and has continued to press. Under the federal law governing a Section 1983 claim, a municipality is responsible for the constitutional torts, for example the alleged unlawful behavior, of its employees, where there is a demonstration that the municipality has essentially condoned a pattern or practice of unconstitutional conduct or, if there be no such pattern or practice of unconstitutional conduct, if, as in the present case, there be simply a single instance of allegedly unconstitutional conduct, that that conduct had been approved at the highest levels of municipal policy-making.

The position of the City has been that decisions in which the Managing Director and the Mayor did not concur were not decisions made at the highest level of municipal policy-making within the meaning of the Supreme Court cases--*Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and those which have followed Monell--which explicate these doctrines. Judge Hall concluded that the Commissioners were placed high enough in the scale of authority so that their decisions were chargeable to the City under federal law.

Judge Hall also concluded that Commissioners Sambor and Richmond were suable under state law since there is liability for municipal officers for what is called, among other things, "willful misconduct." It was Judge Hall's view that a jury might so characterize the conduct of the Commissioners. That at least was a factual determination which was tenable on the record, and therefore, they were suable. And Judge Hall concluded also that the City of Philadelphia could be sued under state law at least with respect to the alleged misconduct of Commissioner Sambor, since, as of the time of Judge Hall's report and recommendation, there appeared to be a basis in the city code for acquiescence by the City of Philadelphia in liability for misconduct, tortious misconduct, by police officers. This is an issue which we will come back to later.

In this court, on review of Judge Hall's report and recommendation, we are faced with exceptions taken both by Ms. Africa through her backup counsel Mr. Dennis on the one hand and with exceptions taken by the City, by Commissioner Sambor and Commissioner Richmond, and by those other defendants who have not yet been dropped from the case under Judge Hall's analysis. No exceptions were taken, of course, by Mayor Goode or Managing Director Brooks since the report and recommendation had cleared them of liability.

[2] The first matter to be considered is plaintiff's exceptions to Judge Hall's determination that the decision to drop an explosive device, a bomb, notwithstanding its tragic consequences, could, when taken on the basis of the information known to those who made the decision at the time it was decided, have been deemed reasonable under the standards of *Tennessee v. Garner*. The question is an extremely close one. One cannot but be deeply troubled trying to imagine the stresses which could have led decision-makers to authorize so extraordinary a law enforcement measure. However, I am persuaded that, as close as the issue is, Judge Hall's analysis of that aspect of the case is correct and that qualified immunity is available to the defendants, as Judge Hall concluded, with respect to the decision to drop the explosive device.

[3] We turn next to the decision to let the fire burn. Here, of course, the exceptions are taken principally by Commissioners Sambor and Richmond since Judge Hall concluded that that was an untenable decision under the Tennessee v. Garner standards. He could not find a necessity which warranted letting the fire burn. In particular, the Commissioners challenge Judge Hall's analysis on the basis of what they read his decision to be, namely that Commissioners Sambor and Richmond decided to let the fire burn after the bunker on the top of 6221 had been effectively

neutralized. It is argued that there is no evidence to support that construction of the decision made by the Commissioners. The evidence shows rather, so it is contended, that the decision made by the Commissioners was to let the fire burn until the bunker was neutralized, at which point efforts would be made to combat the blaze.

In reviewing this record and the recommended decision as contained in Judge Hall's report and recommendation, I have focused on the decision to let the fire burn at all. It appears that no flame was detected for a number of minutes after the bomb itself fell on the rooftop. The bomb itself fell at about 5:30. At some later point, fire was visible. The record, I think, is uncertain as to whether that would have been twenty of six, quarter of six, ten of six, somewhere in that neighborhood. And the ambiguities of course involve where one observes from and what constituted evidence of fire. However, in addressing the decision to let the fire burn at all, which is the view that I am addressing in this decision, I start with the testimony of Managing Director Brooks who in effect had been the superintendent of Police Commissioner Sambor's decision to drop the bomb, a decision that had to be ratified of course by the Managing Director and in turn by the Mayor before being carried out.

Managing Director Brooks gave the following testimony on October 16, 1985 before the MOVE Commission, the Commission appointed by the Mayor and chaired by William H. Brown, III, to inquire into the events of May 13, 1985. The questioner was William B. Lytton.

Q. Now, as I understand what you said with regard to the effect that this explosive device would have, you said it might blow the bunker off the roof, is that correct?

A. Yes, it was an expectation that, because the bunker protruded by some 12 to 20 inches off the edge of that roof, it might fall off.

Q. Now, if the bunker didn't fall off, but you had the

hole in the roof, what were you going to do?

A. Well, the bunker would have been--by dropping that explosive on that roof, the bunker would have been pretty much neutralized even if it didn't knock it off.

Q. What would you have done? What was the plan if--let's say the bomb drops, the hole is in the roof, the bunker is still there. What do you do next?

A. The teams were on the ends of the roof and they would then proceed up to the hole and insert the tear gas, the concussion devices and the smoke.

Q. Now, when you say the bomb would neutralize the bunker even if it didn't knock it off, what do you mean?

A. It would be very difficult to stay up there.

Q. Well, did you feel there was any discussion that if there were any human being inside that bunker, he would be injured or killed to the point or injured to the point that he would not be able to take offensive action?

A. I think so.

What was the decision taken by Commissioner Sambor and Commissioner Richmond? In testimony of Commissioner Sambor, the Commissioner was asked whether he had instructed the Fire Commissioner to let the bunker burn.

A. I did not order the Fire Commissioner to do anything. I requested of him that if we let the roof burn to get the bunker, could we then subsequent to that control the fire.

Q. If we consider the word 'tells' as something other than order is it accurate?

A. Yes, sir. It was a recommendation and a request. I wanted to get the bunker. I wanted to be able to somehow have tactical superiority without sacrificing any lives if it were at all possible. And in that vein, I asked him--I'm a police officer. I am not a firefighter. I asked him for his concurrence that if we let the roof burn to get the bunker, could we then control the fire. And whatever the response, it

was in the affirmative. Commissioner Richmond also gave testimony with respect to the decision to let the fire burn.

Q. I'm asking you could you have said--I mean was it within your authority to have said no, I've got to put this fire out now and proceed to do what youcould to put it out?

A. No, it was not within my authority. If there was a disagreement between Sambor and I, it would have been resolved at Brooks' level.

Q. So you're saying if you had disagreed with Commissioner Sambor's, premise to let the fire burn, that you would have gone to Brooks to have him decide what you should do.

A. That's correct.

Q. Did anybody on the scene that you know disagree with letting that fire burn?

A. There were only two people involved in that decision. The answer is no.

Q. I didn't ask you about the decision.

A. Not to my knowledge.

Q. Now, do you remember at all stating that you would characterize the decision to let the bunker burn as a strong recommendation from Police Commissioner Sambor?

A. I think, yes, that sounds familiar.

Q. Now, had the Police Commissioner not asked you that, and let you do what you wanted to do, told you it was up to you, what action would you have taken if any?

Mr. Kennedy [Mr. Richmond's attorney] Objection. It's hypothetical. You can answer the question. It would be speculation on his part.

A. I would have started the "squirts."

We have then a decision taken at the request of Commissioner Sambor to get the rest of the bunker. Was it necessary in Tennessee v. Garner terms to get the rest of the bunker? Managing Director Brooks has testified that the bunker had to have been in effect substantially neutralized

simply by the impact of the bomb on the roof. There is nothing in the record to show that the bunker had been utilized in any way as a fortification by those inside of the MOVE house after the dropping of the bomb--or even to any significant extent or even at all for some substantial time before the dropping of the bomb. The testimony of Managing Director Brooks, who was apparently in a position to observe the rooftop fairly clearly, was that, after the dropping of the bomb, he saw no sign of life on the roof until a dog appeared coming up onto the roof through the hole in the roof and then walking away.

The Commissioners have referred to the dangers to police and fire personnel from those inside the MOVE house. Quite evidently, concerns about how close fire fighters and their equipment could get to 6221 Osage imposed constraints on how effective various techniques of fighting the fire, once the fighting was agreed on to begin, would be. But I cannot conclude that there is a demonstration which leads to the judgment as a matter of law that it was reasonable as a matter of necessity, at the point after the bomb was dropped and when a flame was first visible, for the law enforcement officials to permit flame to continue until it totally consumed what remained of a bunker which was under Managing Director Brooks' perception substantially neutralized on the impact of the bomb. That it might be convenient to have let the balance of the bunker be consumed by fire is perhaps a tenable view. That it was necessary, in Tennessee v. Garner terms, I can find no basis for concluding. And indeed, the very formulation by Police Commissioner Sambor seems to underscore that. By his statement, he said that he wanted to achieve the tactical superiority that would be obtained in removing the balance of the bunker if this could be accomplished without any loss of life. Without such assurance, he would not have made the request that he did. There is nothing in that characterization that *341 would suggest that he felt that, constrained from letting the fire go

forward to consume the balance of the bunker, he would be imposing on his personnel the grave dangers the mitigation of which justifies a *Tennessee v. Garner* decision to use deadly force.

My analysis of this aspect of the case would, I think, be incomplete if I did not refer to the fact that before Judge Hall there was considerable reliance by the defendants on a case decided by a federal court in Arkansas in 1986, *Ginter v. Stallcup*, 641 F.Supp. 939, a case which was subsequently appealed to the Eighth Circuit, which affirmed in part and reversed in part, 869 F.2d 384 (1989). The Court of Appeals opinion is really not particularly significant for our purposes. The much more extended opinion is the district court opinion: It deals with a situation in which a woman sued FBI agents and other local police officers for a fire which had consumed her home when it was apparently being used as a place of refuge by one who was being pursued by the law officers for a violent crime and was perceived to be a very, very dangerous person indeed. And in the attempt to reach that armed accused, a hole was made in the roof, and not only tear gas but incendiary fuel was introduced inside. And there was discussion by the court as to whether that was a constitutionally permissible mechanism of law enforcement.

The court concluded that there was no "clearly established law" to lead to the conclusion that such a "burnout" as a means of forcing a fugitive out would violate the constitutional right of that person, that is, the fugitive. The district court went on to say:

> The courts may, in response to such police tactics as were publicized in relation to the effort to apprehend persons in the M.O.V.E. Headquarters in Philadelphia, PA in 1985, conclude that such methods under such circumstances would violate the constitutional rights of the persons harmed. Indeed,

> courts might hold on the basis of the facts in this case that the use of fire to "burn out" a fugitive would violate the constitutional rights of the fugitive Kahl. But the point is that no court had so held prior to June 3, 1983.

641 F.Supp. at 953 (footnote omitted).

The events in suit in the Ramona Africa case and in the Leaphart and James cases as well took place not in June of 1983 but in May of 1985, two months after the Supreme Court had addressed the use of deadly force in *Tennessee v. Garner*. In this court, there has been no reliance on *Ginter v. Stallcup*, but I had thought it appropriate to address that aspect of the case since it has figured in the case's development up to the stage at which Judge Hall filed the report and recommendation which I am today reviewing. And indeed, he discusses and distinguishes *Ginter v. Stallcup* in his extensive and thoughtful opinion.

Finally, I should say on this aspect of the case that some argument has been made to me in the extended and very valuable oral presentations in this court on December 28, 1993--that is to say just last Wednesday--that the activities of Commissioners Sambor and Richmond must be judged on the basis of what they intended, and since there is no evidence that they intended the devastating and tragic consequences of the decision to let the fire burn, they must be insulated from liability. That is not the law of the Constitution. In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), Chief Justice Rehnquist, reviewing prior decisions including earlier opinions of his own, had this to say at page 397, 109 S.Ct. at page 1872. "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without

regard to their underlying intent or motivation. See *Scott v. United States*, 436 U.S. 128, 137-139, 98 S.Ct. 1717, 1723-1724, 56 L.Ed.2d 168 (1978); see also *Terry v. Ohio*, supra [392 U.S. 1], at 21 [88 S.Ct. 1868, at 1879, 20 L.Ed.2d 889 (1968)] (in analyzing the reasonableness of a particular search or seizure, 'it is imperative that the facts be judged against an objective standard'). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

Accordingly, it is my view that Commissioners Sambor and Richmond are not entitled to summary judgment on grounds of qualified immunity for their decision to let the fire burn at all. Some argument has been made that Commissioner Richmond, because he was Fire Commissioner and not Police Commissioner, is entitled to have his conduct judged by a somewhat more relaxed standard than that of a veteran police officer. It is apparent that the Fire Commissioner, though he recognized his independent authority, was persuaded that the right course of action was the one to be taken by the senior police officer at the scene, the Commissioner himself. Managing Director Brooks' testimony makes it plain that he regarded the operation with respect to the assault on 6221 Osage as essentially a police operation, and this perhaps explains why his direct communication at the time of communicating his decision hat the time had come to put out the fire was made to Commissioner Sambor. Commissioner Richmond opined that had there been no request made by Commissioner Sambor, he, Commissioner Richmond, "would have started the squirts." That is to say he would have moved at once to fight the fire, but he was prevailed on to acquiesce in a decision to let the fire go on for a while.

In that respect, and turning back to the Pennsylvania statute, Section 508, which I have suggested in a significant

sense has been given a measure of constitutional status by *Tennessee v. Garner*, it is of interest to remember that the statute is directed to the use of force in making an arrest by a "peace officer." And the statute goes on to explain the authority of "a peace officer or any other person whom he has summoned or directed to assist him." And in a sense transferring that almost quaint statutory language to the situation before us, we have Commissioner Sambor as a peace officer who has summoned Commissioner Richmond to assist him. But I think we disrespect the Constitution if we (1) suggest that a fire commissioner can subordinate his professional judgment that a fire should be fought but for the request of a police commissioner and (2) at the same time exculpate the fire commissioner from ensuing constitutional liability. And so I think when Commissioner Richmond as it were loaned himself to Commissioner Sambor, he must be held to have acquiesced in the same constitutional standards which Commissioner Sambor was obligated to observe even though Commissioner Richmond may not have been acquainted with the language of Justice White in *Tennessee v. Garner.*

[4] I have said that I conclude, as Judge Hall did, that the two Commissioners are not entitled to summary judgment on qualified immunity grounds though my analysis of the factual record differs in some respects from that pursued by Judge Hall since I have focused on the decision to let the fire go on at all. In one important respect, the case as it stood before Judge Hall has shifted as it has come before me. It will be recalled that Judge Hall recommended that summary judgment be granted in favor of Managing Director Brooks and Mayor Goode on the ground that neither one had any role in the decision to let the fire burn.

On argument last Wednesday, I inquired of Mr. Dennis as backup counsel for Ms. Africa whether there was not some basis in the record for concluding that conceivably

Managing Director Brooks concurred for a time in the decision to let the fire burn. Mr. Dennis was not, as I put the question, prepared to make that contention. He and Ms. Africa had not taken exception to Judge Hall's factual analysis as to that aspect of the case. I put it to Mr. Dennis that there was testimony of Commissioner Sambor, deposition testimony, which at least I read as saying that Managing Director Brooks had concurred in the decision to let the fire burn but only to reach the bunker. After giving that testimony some thought, Mr. Dennis said he would revise his position and would indeed take exception to that aspect of Judge Hall's decision. There were substantial and very understandable objections raised from counsel for the affected defendants. And the defendants most particularly affected were Mr. Brooks represented by Mr. Waxman and the City of Philadelphia represented by Ms. Hix--Mr. Brooks potentially affected because the very question at issue was whether Judge Hall had been right in recommending qualified immunity for Mr. Brooks, the City of Philadelphia at least potentially affected because acquiescence by the Managing Director would change the context in which a decision would be made as to whether the City of Philadelphia was itself potentially liable for the conduct sued on. I was urged that the issue that I had raised and which was prompting Ms. Africa through counsel to change her position on was an issue which was waived. I was also urged very cogently by Mr. Waxman that he in representing Mr. Brooks was put at a substantial and very unhappy disadvantage by a question put at this eleventh hour phase. The City emphatically expressed similar concerns.

It was agreed that Commissioner Sambor, Mr. Morris' client, would be reinterviewed on this very aspect of the case with a view to seeing whether had misunderstood his testimony or whether he had misspoken himself or whether what I thought I had gleaned from his testimony was indeed close to his meaning. On December 29, a day after oral

argument, I received the following letter from Mr. Morris. It runs as follows:

Dear Judge Pollak:

Yesterday's proceedings left an open question concerning the testimony of my client Gregore Sambor. The question has been answered. I have represented the following to other counsel (noted below) [counsel in question being Ms. Hix, Mr. Waxman, Mr. Dennis, and Mr. Fincourt Shelton who is counsel for plaintiff in the James case] and they have authorized me to represent to the Court as follows:

> Mr. Sambor recalls two separate conversations with Mr. Brooks. In the first conversation, Brooks noted that he could see fire on the roof, and Sambor explained that they were letting the fire get the bunker. As stated in the deposition, Sambor says Brooks concurred saying, 'Only the bunker.' Brooks then called back a few minutes later and relayed the Mayor's order to put out the fire.

Obviously, this represents Mr. Sambor's recollection and not necessarily the position of other parties. However, counsel agree that it may be considered as a clarification of my client's deposition testimony. In light of this clarification, counsel await your advice as to whether we are to reconvene.

I am indebted to all participating counsel for their prompt and effective efforts to clarify the record. I did not reconvene these proceedings given the information which Mr. Morris had so concisely presented. I felt that the record was complete. The argumentation before me had been extensive. I saw no reason to impose upon the parties and their lawyers for further argument before I reached my decision, and I scheduled today's session to announce my decision.

I have received submissions subsequent to Mr. Morris' letter. I have heard from Mr. Dennis, who reemphasizes Ms. Africa's change of position. I have heard from Mr. Waxman and from Ms. Hix reemphasizing their

view that there has been a waiver and that the clarification contained in Mr. Morris' letter of December 29 with respect to Commissioner Sambor's testimony should not be considered by me.

Mr. Waxman further argues that there is no other testimony that suggests that Managing Director Brooks did play any role in the decision to let the fire burn, and that this reaffirmation in 1993 of 1991 deposition testimony should not be given any significant credence.

[5] I address, first, the question of waiver. The submission of the City is:

In *Thomas v. Arn*, 474 US 140 [106 S.Ct. 466, 88 L.Ed.2d 435] (1986), the United States Supreme Court ruled that the Court could determine that failure to object to a recommendation of a magistrate within the applicable time period constitutes a waiver of the objection. A situation, such as the one before this court, where plaintiff affirmatively states that she is not objecting to the recommendation compels the finding that the objection has been waived. The City defendants, therefore, respectfully request that plaintiff's request to revise her objections be denied.

The City's reliance on *Thomas v. Arn* does not seem to me persuasive. *Thomas v. Arn* was a case in which the Supreme Court approved a rule adopted by the Sixth Circuit under which one who fails to file objections to a magistrate's report and recommendation within a specified ten-day period forfeits the right to seek review by the court of appeals of the magistrate's rulings with respect to which no exception has been taken. *Thomas v. Arn* arose in the context of exactly that--a lawyer who, notwithstanding that the lawyer had been given an extension of time to file exceptions, did not do so. The district court, on reviewing the magistrate's report and recommendation, nonetheless decided on its own initiative to

examine the report and recommendation in extenso and approved it.

The petitioner then went to the Court of Appeals to challenge the adverse ruling. And the Court of Appeals, relying on the procedural rule which it had announced in an earlier case as an exercise of its supervisory authority said, by not filing your exception within the stated time, or within the extended time, you, petitioner, lost your entitlement to get appellate review by this Court. The Supreme Court of the United States said that was an acceptable procedural rule if the Sixth Circuit wanted to have such a rule. That would be a rule that a court of appeals could or could not adopt as it chose.

In the course of the opinion in *Thomas v. Arn*, which approved the Sixth Circuit's decision--an opinion which was not unanimous--Justice Marshall, who wrote for the Court, said:

> The District Judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report and to enter judgment. Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue de novo if no objections are filed, it does not preclude further review by the district judge sua sponte or at the request of a party under a de novo or any other standard.

So said Justice Marshall for the Court in 1986.

The Court of Appeals for the Third Circuit has had occasion to consider this general problem subsequent to *Thomas v. Arn*. In *Henderson v. Carlson*, which was a year later, 812 F.2d 874, 878 (3d Cir.1987), our Court of Appeals was pointing out that, unlike some other circuits, our Court of

Appeals has not adopted a rule such as that adopted by the Sixth Circuit. The Third Circuit could understand why such a rule might be adopted, but it had found no reason to preclude appellate review by it even in the curious situation in which a lawyer failed in his or her professional duty to file exceptions to a magistrate's report.

In the course of its opinion the Third Circuit said this:

> Leaving to one side the baggage that the rule carries, we detect a more fundamental problem with the waiver rule. Whether or not objections are made to the magistrate's report, under § 636(b)1(C) the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." While this statutory provision may not require, in th absence of objections, the district court to review the magistrate's report before accepting it, see *Arn*, [474 U.S. at 151], 106 S.Ct. at 472-73, we believe that the better practice is for the district judge to afford some level of review to dispositive legal issues raised by the report. "The authority--and the responsibility--to make an informed, final determination ... remains with the judge." *Mathews v. Weber*, 423 U.S. 261, 271, 96 S.Ct. 549, 554, 46 L.Ed.2d 483 (1976). Given this responsibility, it must be assumed that the normal practice of the district judge is to give some reasoned consideration to the magistrate's report before adopting it as the decision of the court.

Ibid.

Under this advice from the Supreme Court as to what a district judge may do and additional advice from the Court of Appeals as to what a district judge ought to do, it seems to me I would be derelict if I concluded that I could not look at the record as it existed on December 28 and as subsequently

clarified on December 29 in making my decision on whether to sustain this aspect of Judge Hall's report and recommendation. I find no ground for concluding, since counsel have had the opportunity, all of them, of seeing that the matter was appropriately put to Commissioner Sambor, and have also had the opportunity of commenting on Commissioner Sambor's clarifying statement, that any prejudice ensues to any party, and most particularly to the City and Managing Director Brooks, by my considering the record as now clarified. I do so.

And, on that basis, it is clear to me that Managing Director Brooks is not entitled to qualified immunity at this stage since a jury may conclude that he indeed acquiesced for at least a time in the decision to let the fire burn. Of course, a jury may conclude otherwise but that will be in the province of the jury. The matter should not be withheld from jury cognizance.

[6] With Managing Director Brooks remaining in the case, we consider the question of the City's suability. I have already explained the City's position that final decision-making authority lies with the Mayor and the Managing Director. The record as enlarged by Commissioner Sambor's statement of December 29 permits--it doesn't compel, but permits--the possibility of a decision by a jury that Managing Director Brooks was a participant in the decision to let the fire burn.

The City's latest submission contends that only the Mayor had final decision-making authority and that when the matter came to the Mayor's attention he said, no, the fire should be fought at once. Thus, in the City's revised view, the Managing Director does not have sufficient authority to implicate the City.

The Charter describes the various functions of the

major figures in the City. Of course, the Mayor is the chief executive of the City, but the Managing Director, as stated in Section 5.5-100 of the Home Rule Charter, is said to have the following authority:

> The Managing Director shall exercise supervision over all activities of those departments whose heads he appoints and the boards and commissions connected with such departments and shall be the contact officer between the Mayor and such departments, boards and commissions.

Pa.Code, 351 § 5.5-100.

The officers who are appointed by the Managing Director include the Police Commissioner and the Fire Commissioner. The annotation to the section that I have read states that:

> The Managing Director, appointed by the Mayor, is the Mayor's personal assistant and has under his charge the departments of the City rendering municipal services to the people of the City. The Managing Director has the duty of supervising these departments and the boards and commissions connected with them. He appoints, with the approval of the Mayor, the heads of all such departments. The department heads are responsible to the Managing Director who in turn is responsible to the Mayor. To vest authority commensurate with the responsibility given to him, the Managing Director is made the contact officer between the Mayor and the departments, boards and commissions under his supervision; service department heads will thus report to their superior, the Managing Director, and not to the Mayor.

Confirmation of this in practice is certainly reflected in Commissioner Richmond's testimony that, in the event of a

dispute between himself and Commissioner Sambor, the matter would be referred to Managing Director Brooks.

I conclude that the suability of Managing Director Brooks means also that the City is suable by virtue of the potential determination that Managing Director Brooks concurred for a time in the fire.

The City's argument that only the Mayor had authority to make a final decision, and that the Mayor, when he made his decision, vetoed letting the fire burn, seems to me to carry the actual structure of the management of a great city's affairs into an obscure metaphysical never-never-land. The suggestion would be that under the Constitution as implemented by Congress in Section 1983 of Title 42, no decisions are ever made except by the very highest decision-maker, in this instance, the Mayor of the City of Philadelphia.

Given the careful delineation of authority made by the Home Rule Charter which places critical responsibility in commissioners themselves for the departments they head and even more critical decisional authority in the hands of the Managing Director, I reject the view of the City that without the acquiescence of Mayor Goode there can be no potential liability on the City's part with respect to the Section 1983 claim.

My analysis has been predicated on a view of the record that recognizes that a fact-finder could find that there had been acquiescence by the Managing Director in the decision to let the fire burn. I recognize that this is a highly contested factual issue and it may well be that a fact finder would find, as Managing Director Brooks, certainly through his counsel, insists, that he had no such participation.

In view of that state of the record, I would add that if we assume the Managing Director did not participate in the

decision to let the fire burn, and instead that we had a scenario in which the decision was made by the two Commissioners jointly, and only after some time passed the Managing Director stepped in and, first on his own authority, and then on the Mayor's authority, said fight the fire--if we assume that to be the accurate factual scenario, it is my conclusion that within the teaching of the cases that have followed Monell and that have undertaken to elucidate where finality lies, and I have in mind *Pembaur* [*Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)] and the case whose name escapes me, but Ms. Hix will remember because she and I talked about it, Pro--.

MS. HIX: *Praprotnik.*

THE COURT: *Propratnik* [*St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)] yes. Within the authority of those two cases, in the organization of the City of Philadelphia, under its Home Rule Charter, the statutory authority of the two Commissioners is of such consequence that during the period in which they make effective decisions, they must be regarded as having the authority to make final decisions within the meaning of those cases. I stress the fact that § 3.3-101 of the Home Rule Charter provides that:

> Each department shall have as its head an officer who either personally or by deputy or by a duly authorized agent or employee of the department, and subject at all times to the provisions of this charter, shall exercise the powers and perform the duties vested in and imposed upon the department.

Pa.Code. 351 § 3.3-101.

Under § 5.5-200:

The Police Department shall have the power and its

duty shall be to perform the following functions:

(a) Law Enforcement. It shall preserve the public peace, prevent and detect crime....

Pa.Code. 351 § 5.5-200.

As to the fire department, § 5.5-400 provides:

The fire department shall have the power and its duty shall be to perform the following functions:

(a) Fires. It shall extinguish fires at any place within the limits of the City ...

Pa.Code 351 § 5.5-400.

So that if it were the case that the Commissioners made the decision without any overt acquiescence of the Managing Director until the point arrived at which that decision was superseded, I would conclude that they had sufficient authority to make final decisions attributable to the City of Philadelphia.

[7][8] With the balance of this case, I will undertake to be brief. You have all shown extraordinary patience in staying with me this long. I agree with Judge Hall that Ms. Africa's claims under the First and Fourteenth Amendments are unavailing since there is no evidence to substantiate her claim that her free speech and freedom of religion interests were being violated by the defendants or any of them. So, too, the conspiracy charge under Section 1985(3) fails for the reasons presented by Judge Hall. There is no evidence of a racial or class or caste-based conspiracy against Ms. Africa.

[9] With respect to the claims under state law, I conclude that Commissioners Sambor and Richmond are

suable on the state law claims since they could be perceived as having engaged in "willful misconduct," to use the state statutory term. I do not say that that is in any sense a necessary reading of the record, but it is simply that that is a factual question which ultimately is to be addressed by a jury.

So, too, in view of my decision to address this record in its more broadly clarified status with respect to Managing Director Brooks, though Judge Hall would have dismissed him from liability on the state claims, I believe that he is not entitled to summary judgment with respect to the state claims.

[10] The City is, however, right, though not for the reasons argued before Judge Hall, that it, the City, is not liable on the state law claims. Before Judge Hall, the City relied upon the relatively recent--I think it was 1990--repealer by the City Council of a City ordinance which expanded the area of suability of the City with respect to the conduct of police officers beyond that contemplated by the state statute that deals with the tort liability of political subdivisions.

Relying on the repealer, the City argued that Ms. Africa could not sue the City because her case was pending at the time of the repealer. Judge Hall rightly rejected that argument in the face of the then applicable law since both decisions of the Commonwealth Court and, indeed, of this court had recognized that there were remarkable constitutional problems presented by a retrospective attempt to insulate oneself from liability for actions that had already taken place.

However, on November 3, 1993, the Supreme Court of Pennsylvania in the case called, *Philadelphia v. Gray*, 534 Pa. 467, 633 A.2d 1090, came to the interesting conclusion that the City Council of Philadelphia had never had authority to expand the categories of cases in which it could be suable beyond those contemplated by the Pennsylvania Political Subdivision Tort Claims Act. And, so for that reason, as Judge Hall recognized in a report and recommendation issued subsequent to the Ramona Africa report, the City is insulated

from liability on the state claims.

That completes my analysis of the problems to be addressed on review of Judge Hall's report and recommendation. And, I will embody what I have announced in a written order, which I will undertake to file tomorrow.